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EDITED BY THE FACULTY OF POLITICAL SCIENCE OF COLUMBIA UNIVERSITY

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STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW

EDITED BY THE FACULTY OF POLITICAL SCIENCE OF COLUMBIA UNIVERSITY

VOLUME XIII]

INUMBER 1

THE LEGAL PROPERTY RELATIONS OF MARRIED PARTIES

A STUDY IN COMPARATIVE LEGISLATION

ВY

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PREFACE.

THIS comparison of legislation was undertaken during the winter of 1894-95. The pressure of other duties delayed the completion of the work. The examination of the law in most of the states has been brought down to the close of the legislative year 1898; in some instances the legislation of 1899 has been examined.

I desire to express my thanks to many persons from whom I have received assistance and suggestions during the progress of this investigation. I am especially indebted to Professor Munroe Smith, of Columbia University, under whose direction my studies in jurisprudence were prosecuted. It is fitting that I make special mention also of my indebtedness to Professor E. R. A. Seligman, of Columbia University, and to my friend and colleague, Professor Frederick C. Hicks.

BERLIN, February 25, 1900.

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ISIDOR LOEB.

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THE LEGAL PROPERTY RELATIONS OF MARRIED' PARTIES.

§ I. General Introduction.

The nineteenth century has witnessed great changes in the field of matrimonial property relations. Old systems have been subjected to profound modifications by the introduction of new principles, while, in some instances, local customs and statutes have given place to a common system, thereby reducing the great diversity in the rules of family law. This consolidation of the systems was influenced by the general codification movement in continental Europe, but the change in the case of matrimonial property rights is of especial significance because of the great lack of uniformity that had previously existed in this field of private law.

The changes in the property relations of husband and wife have not, however, been due exclusively to the combination of the systems. The development of new conceptions of the individual and of the family has led to a modification of the old systems and the appearance of new regulations in the field of family relations. With this development there has appeared a tendency to make the new rules general in their character. Universality, however, is not as yet a characteristic of the rules of family law. The interests involved are not as general as those which are affected by the law of obligations and other branches of property law. The peculiar social and religious views and customs of a community determine the family organization and regulate the system of property relations between the married parties. In the earlier

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stages only family property exists and there are no true matrimonial property relations. With social development disintegration arises within the family. The religious unity is weakened, and, ultimately, with increased industrial development the economic unity is also impaired. Institutions which have been based upon such unity must likewise become modified, a process illustrated by the history of matrimonial property rights in Roman law. Modern codes are passing through a similar development, as is evidenced by the results of the legislative activity of the nineteenth century.

In England and the United States the legal economic relations of married parties have been revolutionized. fundamental rules of the common law respecting the property and capacity of married women have been abrogated or greatly modified. The changes in the industrial system had affected the economic organization of the family, and it was inevitable that the legal relations should accommodate themselves to the new conditions. At a time when women were acquiring an independent activity it was natural that particular attention should be called to the inequalities to which the law subjected them. Among the arguments advanced against the old system was the charge that that it was based upon the principle of natural inequality of the sexes and of masculine superiority. The reformers demanded not only the restriction of the husband's extensive rights in his wife's property, but also the removal of the disabilities which were imposed upon married women. In general, no account was taken of the fact that some of these disabilities had their historical justification in the desire to preserve the unity of the family, and had not necessarily been influenced by considerations of the natural incapacity of the woman. over, the fact that the same motive had led to the imposition of duties and disabilities upon the husband was frequently disregarded. The personality of the woman and not the relation into which she had entered was considered the true source of her disabilities.

In the early acts no attempt was made at a general revision and codification of the law governing the economic relations of married parties. The legislatures were without models by which to form the new measures, and the full effects of the modifications were not appreciated. ried women's acts confined themselves to the removal of the disabilities of the wife. They did not, in general, deprive her of the exemptions and privileges which she had enjoyed on account of these disabilities, nor was the husband relieved of his previous duties and burdens. As a result, the matrimonial property systems became characterized by gross inequalities and inconsistencies. The husband, though he received no property from the wife, might be held liable for her ante-nuptial debts. His creditors could not obtain satisfaction out of the wife's property, even though, as a matter of fact, the debts had been contracted for the support of the wife. Under the new conditions it was possible for a woman possessing considerable property in her own right to obtain a divorce on the ground of lack of support. A married woman who had been accorded full capacity for carrying on legal proceedings might still be able to plead the fact of coverture as a bar to the running of the period of the limitation of actions. Moreover, while the husband had been deprived of rights in the property of his wife, the latter retained the privileges which she had possessed in his real property.

In undertaking to grant equal rights to the wife the legislature had produced a new inequality, which threatened to destroy the ethical unity of the family. The Roman law, under the influence of similar conditions of economic and social development, came to recognize the equality of married parties in respect to property rights. The regulation of the relations of the parties, however, was determined more logically in accordance with such principle of equality. The later legislation in the United States has removed many of the inconsistencies of the earlier statutes. In general, there is exhibited a marked tendency to carry out the strict principle of equality in defining the legal economic relations of the married parties.

The legislations of continental Europe have felt the influence of the new ideas and conditions. The modifications of matrimonial property law have not, however, been as radical as in the case of England and the United States. planation is to be found in the fact that the property rights of the wife in continental countries were, in general, superior to those recognized by the English common law. modifications have been made in connection with the adoption of the modern codes which have taken the place of the particular laws of local communities. This is particularly true of the civil code of the German Empire, which received legislative approval in 1896 and went into effect on January 1, 1900. A draft code which has been prepared for Switzerland will, if enacted, produce similar results. In some of the older codes important modifications of matrimonial property rights have been made by subsequent statutes, and movements directed to like ends are in active operation in a number of states.

The writer proposes to consider the general principles of the matrimonial property systems which obtain at present in the United States and in the chief states of Europe. Particular attention will be given to recent legislative changes. All of the systems have certain common aims, and there appears an increasing tendency towards the development of common regulations for the realization of these ends. The extent to which this tendency has been realized will appear in this comparison of existing legislation.

The consideration of this subject falls under three divi-

sions. In the first will be presented the general effects of marriage upon the capacities and relations of the parties, independent of the particular system of property rights which may obtain. In the second, the chief forms which have been developed for the regulation of matrimonial property relations will be considered. And, finally, the relations of succession between married parties, as essential to an adequate appreciation of matrimonial property rights, will be discussed.

PART I.

EFFECTS OF MARRIAGE UPON LEGAL CAPACITY.

§ 2. General Legal Capacity of Acting.

THE personal status of married parties in their relation to each other and to third parties is closely connected with the system of matrimonial property rights. Thus, the capacity for performing legal acts is affected by the character of the property relations existing between the married parties. For example, where the law accords the husband extensive privileges in his wife's property, provisions will generally be found by which the married woman's capacity of acting is so restricted as to preserve the rights of the husband. In like manner, the rules governing the property relations of husband and wife may be influenced by the prevailing conception of personal capacity of the parties.

The marriage is not regarded as imposing any general incapacity of acting upon the man. On the other hand, all legislations have, at some time, recognized the general legal incapacity of the married woman. The early Roman and Teutonic laws take this position and consider the incapacity as flowing from the husband's power over the wife. Force is a cardinal element in all primitive legislation, and affects family as well as economic relations. This is illustrated by

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the fact that the marriage is regarded as resting upon a forcible seizure or sale.

The incapacity of the married woman was similar to that which affected her as a child. At Roman law she passed from the patria potestas to the manus mariti. Under Teutonic law the Mund of her father or guardian was exchanged for that of her husband. The former emphasized the power and right of the man, the latter placed stress upon the element of guardianship. In both systems, however, the complete unity of the family, under the authority of its head, excluded any general independent activity of the other members.

The Roman law developed an informal free marriage without manus and, by the last century of the Republic, this had become the normal system. As a result of the absence of manus mariti, the legal personality of the wife was no longer merged in that of the husband. Personal relations arose between the husband and wife. The marriage, as such, was not regarded as affecting the woman's general capacity of performing legal acts.² This is the position of the modern Roman law.³

Primitive Teutonic law developed into a number of different systems. As a rule, however, the general incapacity of the married woman was continued. The reception of the Roman law was limited in the field of family relations and the principle of the general legal capacity of the wife found but slight application. The guardianship of unmarried women gradually disappeared. In the case of the married woman, however, the husband appeared as a sort of permanent natural guardian and the existing matrimonial property relations strengthened this conception.

Sohm, Inst., § 92; Schröder, Lehrbuck, p. 67 seq.; Heusler, Inst., vol. ii, § 130.

² Sohm, Inst., § 93. Windscheid, Pandekten, vol. ii, §§ 490, 491.

In the present century there has been a tendency to regard the general capacity of the woman as remaining unaffected by the marriage. This principle, which is at the basis of the Austrian and Russian codes, has been accepted by the new code of Germany and by the Norwegian statute of 1888 which regulates the property relations between married parties.5 The other continental countries have, in general, preserved the principle that the wife, as such, is under a general disability in respect to her legal capacity of acting. It must not be assumed, however, that the married woman's activity is entirely unrestricted in the one case or that it is completely subject to control in the other. The two classes are distinguished by the fact that in the former the wife has perfect freedom of activity in so far as she is not limited by positive provisions, while in the latter class she has legal capacity of acting only to the extent that this is specifically accorded to her.

England and many of the American states have practically taken the former position. In so far, however, as the common law disabilities of coverture have not been expressly abrogated, it is the rule of interpretation to regard the married woman as restricted in her legal activity to the extent that the law has not accorded her positive privileges. Accordingly, most of the legislations contain specific grants of power to the married woman.⁶

The disabilities to which married women are subjected are explained on various grounds. Some consider the control as the survival of the guardianship of the family or the clan. According to this view it is exercised on account of the weakness and inexperience of the sex. Others reject the assump-

⁴ Motive, vol. iv, pp. 112, 113; Denkschrift, p. 268.

⁶ Stat. June 29, 1888, arts. 11, 19, An. ètran., vol, 18, p. 766.

⁶ For examples of total abrogation of common law, see in Appendix, note A, Miss. Const., § 94, An. Code, § 2289.

tion of natural incapacity and regard the legal disabilities of the wife as justified by considerations of the unity of the family. The legislations have not logically followed either of the above conceptions. It is true that in some states some one principle may have exercised a predominant influence. the same time disabilities exist which can be explained only by reference to other considerations. Thus the prevailing system of matrimonial property relations, including the liability of the husband for the obligations of the wife, has generally exercised considerable influence upon the conception of the legal capacity of the married woman. legislation, however, clearly indicates a tendency to impose restrictions upon the legal activity of married parties only so far as these may be necessary to promote the ethical unity of the marriage. Specific limitations will then arise according to the particular system which the parties select for the determination of their property relations.

§ 3. General Contractual Capacity of the Married Woman.

The absence of any single, uniform principle as the basis of the legal incapacity of the married woman is clearly indicated by the provisions of the French Civil Code which limit the wife's general contractual capacity. The married woman cannot give, alienate, pledge or acquire unless the husband joins in the act or accords his written authorization of the same. Upon the refusal of the husband to grant the necessary consent, the wife may be authorized by the court to perform the act. These provisions may be justified from considerations of conjugal unity, though the power of the wife to appeal from the decision of the head of the family is a departure from the strict principle.

It is provided, however, that the husband cannot grant the wife any general authority to act in these matters. A

¹ C. C., 217.

2 /bid., 219.

special authorization is essential for each act.³ Moreover, if the husband is incapacitated by reason of disappearance, minority, interdiction or criminal punishment, the wife requires a judicial authorization before she can enter into contracts.⁴ These requirements cannot be explained upon the principle of unity of family administration. Under such a principle, where the husband is disqualified the wife must appear as the proper administrator if she is recognized as possessing the natural capacity to fulfill these functions. Upon the same assumption the husband would not be prevented from granting the wife a general power of acting with respect to certain matters. Having satisfied himself respecting the wife's ability, he would delegate the administration to her in the same manner as a party might authorize an agent to represent him generally in certain relations.

On the other hand, the inexperience and natural incapacity of the woman cannot be accepted as the uniform principle, since the code does not impose any general restrictions upon dispositions between the husband and wife. Marriage agreements cannot be contracted or altered after the celebration of the marriage, but it does not appear that this restriction limits ordinary dispositions between the parties, and, in any event, the wife, with the marital authorization, may make contracts with third parties, from which benefits will accrue to the husband.

The combination of different principles is manifested finally in the recognition of acts of the wife, performed without the marital authorization, as negotia claudicantia and hence voidable and not void. Third parties cannot take advantage of the defect of authority, but such plea may be advanced not only by the husband and his heirs, but also by the wife and her representatives.⁵

⁸C. C., 223.
⁴ Ibid., 221, 222, 224.
⁸ /bid., 225.

It is worthy of note that the French legislature has in recent years enacted statutes similar in nature to those which marked the beginning of the contractual capacity of married women in English and American law.⁶ Thus, a married woman has been given the right to make deposits in savings banks, etc., though she cannot withdraw the same if the husband objects to such disposition.⁷ An act of 1899 provides that a married woman may become a member of mutual benefit associations, but she must obtain the marital authorization before she can participate in the administration of such societies.⁸

Reference to the prevailing matrimonial property system is essential to a due appreciation of the regulations concerning marital authorization. The system of community of property which obtains in France has had great influence in determining the general contractual capacity of the married woman. Where the wife has separate property a more or less extensive power of contracting with reference to the same is accorded her by the French, as well as other systems that require the marital authorization.9

The European legislations which have been most directly influenced by the French code have, in general, retained the principle of marital authorization, but have defined it more consistently and have introduced modifications in the direction of a greater freedom of activity for the wife. This is particularly true of the Italian and Spanish codes. The draft code of Italy, submitted in 1862, proposed to accord general legal capacity to the married woman.²⁰ While this principle was not accepted, the marital authorization was con-

Cf. post, § 37.

⁷ Stat., Apl. 9, 1881, art. 6, Bull. des lois, xii Sér., vol. 22, p. 666; Stat. July 20, 1886, art. 13, ibid., vol. 33, p. 279.

^{*}Stat., Apl. 1, 1899, art. 3, Sirey, Recueil, 1899, p. 729.

See post, § 42. ¹⁰ Huc, Code Civil Italien, p. 66.

siderably limited. Thus, the husband may grant the wife a general authorization to enter into contracts.¹¹ Moreover, if the husband is incapacitated by reason of minority, judicially declared disappearance, etc., the marital authorization is not required.¹² As in the French code, the court may always supply the consent of the husband.¹³

The Italian code protects the wife against the undue influence of her husband by requiring the authorization of the court for acts of the wife in cases where her interests are opposed to those of her husband.¹⁴ The Spanish code, on the contrary, does not regard the married woman as subject to undue influence or any natural incapacity. No particular provisions are made for her protection in ordinary contracts with her husband. Moreover, the wife cannot plead incapacity or defect of authority, such privilege being accorded only to the husband and his heirs, and existing solely in the interests of the marital administration.¹⁵

The code of Louisiana ¹⁶ has followed the provisions of the French legislation, but has given a clearer recognition to the natural incapacity of the woman by the requirement for judicial authorization of acts by which the wife undertakes to bind her individual property. ¹⁷ It is considered necessary to protect the wife against the husband as well as against third parties. On the other hand, the influence of the legislation in other American states is to be seen in recent statutes according the married woman the right to subscribe for stock in building and loan associations, to make deposits in

```
    11 Italy, C. C., 134; the Spanish code does not prohibit such grants of authority
    12 Italy, C. C., 135; Spain, C. C., 188. Cf. ibid., 1441.
    13 Italy, C. C., 136; Spain, C. C., 60, 61.
    14 C. C., 136.
    15 C. C., 65.
    16 C. C., 122, 125, 132-134.
    17 C. C., 126-128. Cf. ibid., 129.
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banks and to withdraw and to transfer the same, without the intervention of her husband, as if she were a femme sole.¹⁸

The Swiss cantons, in general, limit the contractual capacity of married women. Some of the cantons still retain the guardianship of women, and others, in providing for the emancipation of women in general, except the married woman from the benefit of such acts. The interests of the family administration have been the chief cause for the continuation of such disability. Separate property of the married woman is recognized in a number of the cantons, and, where this exists the wife is accorded a certain power of contracting in reference to such property.⁷⁹ Most of the legislations, however, do not relieve the wife from her disabilities in case the husband is incapacitated from acting. She continues under guardianship, her acts requiring the consent of the husband's curator or of some other authorized party. In the majority of the cantons it is likewise considered necessary to protect the wife against the undue influence of the husband. Accordingly it is required that she shall be assisted by a guardian ad hoc in order to conclude certain kinds of contracts, particularly those in which the husband has an interest in the matter concerning which the agreement is made.20

The draft Swiss code represents an attempt to harmonize and combine the conflicting rules. The modern principle is followed in that the contractual capacity of the married wo-

¹⁸ Acts, 1894, no. 74; ibid., 1896, no. 63.

¹⁹ Basle, Stat. Mch. 10, 1884, art. 30 seq., An. êtran., vol. 14, p. 552; Glaris, L. B., ii, 174, 175, ibid., vol. 4, p. 518; Lucerne, Stat. Nov. 26, 1880, arts. 11, 16, 22, ibid., vol. 10, pp. 487, 488; Zürich, P. R. G., § 597; Lardy, Ligislations Suisses, pp. 65, 125, 160, 239, 263. Cf. post, § 42.

³⁰ Lucerne, Stat. Nov. 26, 1880, art. 16; Zürich, P. R. G., §§ 599, 600; Lardy, Ligislations Suisses, pp. 28, 67, 125, 126, 190, 225, 278, 303, 333, 348; contra, Basle, Stat. Oct. 16, 1876, art. 5, An. itran., vol. 6, p. 571, where the old rule is partially abrogated.

man is made to depend upon the particular system of matrimonial property relations which obtains between the parties. Following the majority of the cantonal legislations, however, the draft code starts with the principle of general incapacity. The wife, aside from her functions of household administratration,21 has contractual capacity only to the extent that this is recognized by the system which governs the economic relations of the married parties.* An exception arises with respect to the separate property of the wife. Under all of the systems she possesses the power of contracting generally with reference to such property.²³ Under the draft code the wife possesses the right of exercising an industry or occupation, but the husband in the interest of the conjugal unity is given the right of forbidding the same. The prohibition of the husband may be rescinded by the court if the wife shows that just cause does not exist for such action.44 The possibility of undue influence by the husband is also recognized, and hence the authorization of the court is required for certain acts of the wife.25

The Prussian and Saxon codes of require the marital authorization for the contracts of the wife which may affect the unity of the family or the matrimonial property. Such authorization, however, is not necessary for ordinary contracts respecting the separate property of married women. Moreover, the wife is recognized as having the first right to the matrimonial administration in case the husband is inca-

¹¹ Post, § 8.

¹¹ Switz, Vorentwurf, 212. ¹⁸ Ibid., 215, 269. ¹⁴ Ibid., 186. ¹⁶ Ibid., 214.

³⁶These codes, as well as the other legislations obtaining among the members of the German federal union, were displaced by the national code on Jan. 1, 1900. For the purposes of the present comparison they will be treated as existing legislations.

²⁷ Prussia, A. L. R., ii, I, §§ 196, 320, 377; Saxony, B. G., §1638.

²⁸ Prussia, A. L. R., ii, I, §§ 221, 222, 318; Saxony, B. G., §§ 1640, 1693.

pacitated from acting.⁵⁰ The Prussian legislation, however, places particular limitations upon contracts between married parties. These must be executed before a judge whose duty it is to see that advantage is not taken of the wife. If this requirement is not observed, the wife may acquire rights but will not become subject to any obligation as a result of the agreement with the husband.⁵⁰

The new code of Germany starts with the principle that the contractual capacity of a woman is not affected by her marriage.31 This general principle is modified in the interests of the conjugal unity by the provision that the husband, unless he has consented to the same, may secure the rescission, for the future, of such agreements as require personal service on the part of the wife.32 Before the act will be abrogated the authorization of the court must be obtained. Such authorization must be accorded if the act injuriously affects the marital interests. The same authority may supply the consent of the husband if the latter, by reason of illness or absence, is unable to assent to the act or if his refusal appears unwarranted. The fact that this control over the contracts of the married woman is based upon the desire to preserve the conjugal unity is further indicated by the provision that it may be exercised by a husband who has not attained his majority, but cannot be employed by the latter's guardian or representative.33

An interesting development may be noted by comparing the provisions of the three preliminary drafts of the code with those indicated above. The first draft made all contracts whereby the wife obligated herself for personal service

Ibid.

³⁹ Prussia, A. L. R., ii, 1, §§ 202–204, 261, 325–327; Saxony, B. G., §§ 1684, 1700.

³⁰ A. L. R., ii, 1, §§ 198-201.

[&]quot; See ante, § 2, note 4.

^{**} Germany, B. G., § 1358.

absolutely dependent upon the consent of the husband, but provided that the husband alone could attack the validity of agreements that lacked the proper authorization.34 second and third drafts recognized the principle, established in the code as adopted, that such acts of the wife are valid without marital authorization, and that the court could supply the husband's consent under the circumstances above noted. But the husband was given the unrestricted right of abrogating such acts for the future, even if he had consented to the same or if his consent had been supplied by the proper authority.35 Starting with such acts of the wife dependent upon the will of the husband, the close of the development finds the married woman free to enter into such contracts. The husband, with the previous authorization of the court, is enabled to revoke the agreements for the future, provided his consent to the same has not been accorded directly or through the agency of the judge.

Aside from this limitation, the general contractual capacity of the married woman is limited only as regards her power of affecting the matrimonial property.³⁶ Acts of the wife affecting her separate property are subject to no particular limitations, and the same is true of contracts between the husband and wife.³⁷

The compilers of the German code were influenced by the Roman conception of the wife's contractual capacity. The Roman law contains no particular provisions respecting the

MI. Entwurf, § 1277.

³⁶ II. Entwurf, § 1258; III. Entwurf, § 1341.

³⁶ See post, §§ 20, 21, 27, 42.

⁸⁷ In case of the bankruptcy of a married party, the contracts made with his spouse in the preceding year, whether before or after the marriage, are attackable by the creditors so far as they are damaged thereby and the other party does not prove that he did not know of the intention of the common debtor to damage his creditor's interests. Germany, Konkursordnung, § 31, R. G. Bl., 1898, pp. 618, 619.

ordinary contracts of married women. It was not found necessary to limit her capacity of affecting the matrimonial property. The husband's rights in the dowry were originally those of an owner, and even after the legislation of the Empire he continued to be regarded as the formal owner during the marriage.³⁸ The Roman law likewise imposed no limitations upon ordinary contracts between the husband and wife.³⁹

The Austrian of and Russian codes accept the general principles of the Roman law respecting the contracts of married women, and in Norway, practically the same condition obtains, the power of the wife to conclude ordinary contracts being unrestricted except with reference to her capacity of binding the matrimonial property.

Under the English common law system marriage destroys the general contractual capacity of the woman. She cannot contract even with the consent or joinder of her husband. Different explanations of the origin and basis of this rule have been advanced. The conception that marriage unites the man and woman in one person has exercised a great influence upon the development of the law governing the relations of husband and wife.⁴³ This legal fiction, however, will not serve to explain the disabilities of married women. Recent investigations tend to prove that the early law did not regard the contractual capacity of the woman as destroyed by the marriage, but that such incapacity developed as a result of the fact that she ceased to possess property

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³⁰ See post, § 32.

Sohm, Inst., § 94; Windscheid, Pandekten, vol. ii, § 491.

⁴⁶Certain contracts between husband and wife must be concluded before a notary. Stat. July 25, 1871, R. G. Bl., no. 76.

⁴¹ Leuthold, R. R., pp. 59, 60.

⁴ See post, §§ 20, 21.

⁴³ Black, Comm., vol. i, p. 442; Kent, Comm., vol. ii, p. 129.

which could be bound by her contracts.44 The general principle governing the incapacity of the married woman appears to be the desire to preserve the unity of the family and the administration of the matrimonial property. if the husband is banished or is regarded as dead in the eyes of the law, as in the case of imprisonment for life, the wife possesses general contractual capacity.45 There are, however, exceptions to the general principle. For example, abandonment of the wife by the husband, which is not accompanied by his departure from and loss of residence in the state, does not have the effect of removing her disabilities.46 This constituted one of the greatest hardships of the common law, and was largely instrumental in bringing about the statutory modifications. The fact that the married woman cannot contract with her husband nor enter into engagements with third parties, even if the marital authorization has been obtained, represents another departure from the general principle. Such limitations cannot be explained from considerations of family unity. On the contrary, they develop serious obstacles to the efficient administration of the matrimonial property, and cumbrous processes were invented in order to evade their provisions.

The rules established under the equitable jurisdiction of the courts are, however, based upon the general principle indicated above. Contracts, affecting the wife personally, which might impair the conjugal unity, are not valid in equity any more than at common law. But the English chancery courts recognized the power of the married woman to possess a separate estate, free from the common law rights of the

46 Ibid.

[&]quot;Pol. and Mait., Hist., vol. ii, p. 432; Florence G. Buckstaff, "Married Women's Property in Anglo-Saxon Law" An. Amer. Acad., vol. iv, p. 247 seq.; Ernest Young, "The Anglo-Saxon Family Law," Essays in Anglo-Saxon Law, p. 176 seq.

⁴⁵ Kent, Comm., vol. ii, p. 155 seq.

husband. With respect to such property the wife could contract as if she were a femme sole, subject to such limitations upon her capacity as were contained in the act of settlement.⁴⁷ The fear of undue influence on the part of the husband led to the recognition of certain limitations which would not bind the unmarried woman. The most famous of these limitations is the restraint upon anticipation, intended to prevent the woman, under marital influence, from destroying or disposing of the capital of her separate estate.⁴⁸

The effect of the married women's property acts has been to extend the general contractual capacity of the wife. land, as early as 1856, an attempt was made to accord to the married woman a general power of making contracts, but it was not until 1868 that a bill passed the House of Commons granting her the general right to contract as if unmarried, subject to limitations with respect to particular matters.49 The bill encountered severe opposition in the House of Lords, as a result of which important modifications were made. finally enacted the wife was not accorded general contractual capacity. The married woman was given a limited statutory separate estate with power of disposition over the same.50 The Married Woman's Property Act of 1882 extended the scope of the separate estate of the wife and accorded her a general power of contracting in respect of and to the extent of the same, as if she were a femme sole.51 It was provided that every contract of a married woman should be deemed to have been entered into with reference to her separate property unless the contrary be shown.⁵² Finally, an act of

⁶¹ Ibid., p. 163 seq. This is the view generally accepted in England and the United States. An opposing view is that she has only such capacity as is granted under the terms upon which the estate was settled.

⁴⁶ Schouler, H. & W., § 202; cf. post, note 53.

^{*} Bull. Lėg. comp., 1871, p. 15.

⁴ Act 33 & 34 Vict., c. 93.

⁵¹ Act 45 & 46 Vict., c. 75, § I (1), (2).

⁵² Ibid., § 1 (3).

1893 completed the development by repealing the above clause and raising an absolute presumption that the contracts of the married woman are made in respect to her separate property, whether she is or is not entitled to any such estate at the time when she enters into the agreement.⁵³ Such contracts, moreover, bind all of her property after discoverture.⁵⁴

In the United States the movement to give validity to the contracts of married women commenced at an earlier date than in England. In the first part of the nineteenth century acts were passed conferring contractual capacity upon married women who were abandoned by their husbands. Later, married women in general were granted power to contract in relation to certain property to which was given the character of a statutory separate estate.55 These specific grants have been gradually enlarged, until the close of the century finds many of the states recognizing that married women have general contractual capacity, while those that still maintain the general common law rule have nullified it. to a great extent, by numerous exceptions. The legislation has been so extensive and, at times, so inconsistent and contradictory, that it becomes a difficult matter to indicate the exact position of each state. A general classification will be sufficient to indicate the prevailing tendency. The individual legislations will fall into one of two divisions according as they have or have not accorded general contractual capacity to the married woman. In the first class, limitations may be placed upon certain kinds of contracts, while in the second class more or less extensive specific grants

⁵³ Act 56 & 57 Vict., c. 63, §§ I (a), 4. It was expressly provided, however, that no such contract should be binding upon separate property which the wife is restrained from anticipating, though such property may be bound by the costs of judicial proceedings which she institutes (*ibid.*, §§ I (c), 2).

⁶⁴ Ibid., § I (c).

⁵⁵ See post, § 37.

of capacity are made. In the following states and territories the married woman is recognized as possessing general contractual capacity: ⁵⁶ Alabama, ⁵⁷ Arizona, ⁵⁸ California, ⁵⁹ Colorado, ⁶⁰ Connecticut, ⁶¹ Delaware, ⁶² Idaho, ⁶³ Illinois, ⁶⁴ Indiana, ⁶⁵ Iowa, ⁶⁶ Kansas, ⁶⁷ Kentucky, ⁶⁸ Maine, ⁶⁹ Maryland, ⁷⁰ Massachusetts, ⁷¹ Minnesota, ⁷² Mississippi, ⁷³ Missouri, ⁷⁴ Montana, ⁷⁵ Nebraska, ⁷⁶ Nevada, ⁷⁷ New Hampshire, ⁷⁸

⁸⁶ For limitations upon capacity to make particular contracts, see *post*, §§ 4, 5, 20, 21, 42.

⁸⁷ Code, 1896, § 2526. The Code of 1886 limited this capacity to contracts in writing entered into with the written consent of the husband.

⁸⁶ R. S., 1887, §§ 2103, 2104.

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¹⁶ Subject in contracts with husband to general rules respecting contracts between persons occupying confidential relations. C. C., 158. *Cf.* Stat. & Amend., 1891, p. 137; *ibid.*, 1895, p. 53.

• An. St., 1891, § 3021.

61 So far as regards third persons. G. S., 1888, § 2796.

es Laws, vol. 14, c. 550, §§ 2-4, in R. C., 1893, p. 600.

⁶³ R. S., 1887, §§ 2504, 2508.

⁶⁴ An. St., 1885, c. 68, ¶ 6. But transfers between husband and wife to be valid as against third persons must be publicly recorded (*ibid.*, ¶ 9).

⁴³ An. St., 1894, § 6960.

46 Code, 1897, § 3164.

⁶⁷ G. S., 1889, § 3759.

44 Stat., 1894, § 2128. Same qualification as in Illinois. See ante, note 64.

• R. S., 1883, c. 61, §§ 1, 2, 4.

70 Laws, 1898, c. 457, §§ 4, 5.

11 But she is not authorized to contract with husband. P. S., 1882, c. 147, § 2.

⁷² G. S., 1894, §§ 5530, 5532.

¹⁵ An. Code, 1892, § 2289. Limitations exist upon certain contracts between husband and wife. *Ibid.*, §§ 2293, 2294.

¹¹ R. S., 1899, § 4335.

¹⁵ C. C., 1895, §§ 214, 256. Same qualification as in Cal. See ante, note 59.

¹⁶ To same extent as a married man. C. S., 1891, § 1412.

TG. S., 1885, § 517. Same qualification as in Cal. See ante, note 59.

⁷⁵ P. S., 1891, c. 176, § 2.

New Jersey,⁷⁹ New York,⁸⁰ North Dakota,⁸¹ Ohio,⁸⁰ Oklahoma,⁸³ Oregon,⁸⁴ Pennsylvania,⁸⁵ Rhode Island,⁸⁶ South Carolina,⁸⁷ South Dakota,⁸⁸ Utah,⁸⁹ Vermont,⁹⁰ Washington,⁹¹ Wyoming ⁹² and Hawaii.⁹³

The following legislations have not entirely abrogated the general incapacity of the married woman to enter into con-

⁷⁹ Act Mch. 27, 1874, § 5, Rev., 1877, p. 637; but not authorized thereby to contract with husband (*ibid.*, § 14), though she may assign policies of life insurance to him (*ibid.*, § 19).

^{**} Laws, 1896, c. 272, § 21.

a R. C., 1895, § 2767.

⁸⁸ R. S., 1891, §§ 3112, 4107. Same qualification as in Cal. See ante, note 59.

^{*} R. S., 1893, § 2968. Same qualification as in Cal. See ante, note 59.

⁶⁴ An. St., 1887, § 2997.

⁸⁶ Laws, 1893, p. 344, §§ 1, 2.

⁸⁶ An act of 1893 provided that a married woman could make any contract the same as if she were single (Acts, 1892–93, c. 1204). The Revision of 1896 returned to the common law rule of incapacity with numerous positive grants of capacity (G. L., 1896, c. 194, §§ 3, 4). In the same year an act of the legislature repealed the positive grants of power to contract and restored the general principle of act of 1893 (Acts, 1896–97, c. 335).

⁸¹The new constitution of 1895, art. xvii, § 9, introduces this rule. Before its enactment the married woman could make contracts with reference to her separate estate as if unmarried. C. S. L., 1893, § 2167.

C. L., 1887, § 2590. Same qualification as in Cal. See ante, note 59.

^{**} R. S., 1898, §§ 1199, 1200.

⁹⁰ Except in agreements with her husband. Stat., 1894, § 2644.

⁹¹ G. S., 1891, § 1409.

⁹² Laws, 1888, c. 59, § 1. Before this act her capacity was limited to contracts entered into with reference to her property. R. S., 1887, § 1559.

⁸³ Except that contracts for personal services require the written consent of her husband and she is not authorized to contract with her husband. Laws, 1888, c. xi, § 2.

tracts: Arkansas,⁹⁴ Florida,⁹⁵ Georgia,⁹⁶ Michigan,⁹⁷ New Mexico,⁹⁸ North Carolina,⁹⁹ Tennessee,¹⁰⁰ Texas,¹⁰¹ Virginia,¹⁰²

⁸⁴ She may make contracts Æspecting her separate estate and services, and may effect insurance policies upon the life of her husband. Dig. Stat., 1894, §§ 4944—4946.

⁸⁵ She may charge her estate in equity for purchase price and for agreements made for its benefit (Const., art. xi, § 2); dispose of her earnings (R. S., 1892, § 2075); control her deposits in banks (*ibid.*, § 2119); and subscribe for stock in building and loan associations (*ibid.*, § 2208).

⁸⁶ She may contract with reference to her separate estate (Code, 1895, § 2488), but the consent of the court is essential to the validity of contracts that she may make with her husband or trustee (*ibid.*, § 2490).

** She may contract respecting her separate property. An. St., 1882, § 6295.

³⁸ With consent of husband she may make any contract which she might make if unmarried (C. L., 1897, § 1510). She may contract with her husband as if unmarried (*ibid.*, § 1511).

³⁹ Husband's written authorization is essential to validity of all contracts affecting her property except those made for personal expenses, support of family or to pay ante-nuptial debts (Code, 1883, § 1826). Contracts between husband and wife which affect latter's property for a longer period than three years, require special form (*ibid.*, § 1835), but other contracts between them, not contrary to good morals, are valid (*ibid.*, § 1836).

100 No statutory separate estate exists. The married woman may freely dispose of such property as is settled upon her for her separate use (Code, 1884, § 3350). She may contract in writing so as to bind her property with mechanics' lien (ibid., § 2741); may effect insurance on husband's life (ibid., § 3336); may make deposits in banks (ibid., § 1729); and may hold stock in building and loan associations (ibid., § 1757).

¹⁰¹ She may contract for necessaries for herself and children and for expenses for benefit of her separate property (R. S., 1895, art. 2970). She may contract so as to bind benevolent associations of which she is a member (*ibid.*, art. 644), and where appointed executrix, *etc.*, may give bond which shall bind her separate property (*ibid.*, arts. 1947, 2604).

102 She may make contracts with respect to her labor or separate estate as if she were a femme sole. Code, 1887, §§ 2286, 2288.

West Virginia, 103 Wisconsin 104 and the District of Columbia. 105

§ 4. Power of the Married Woman to become Surety for another Person.

Some states, while according the married woman a general capacity of contracting, limit her power to enter into specific kinds of agreements. This is particularly true of contracts whereby she undertakes to answer for the debt or liability of another person. Many of those legislations, also, which make the marital authorization requisite to the validity of the wife's contracts, place additional restrictions upon her contracts of surety.

Here, feminine weakness is the determining factor. The inexperience of the woman and the probability that her confidence, which she so freely accords, may be taken advantage of, are the chief considerations at the basis of such provisions. Thus, the famous senatus consultum Velleianum, passed in the reign of Claudius, applied to unmarried as well as married women. The intercessio of a woman was prohibited. It was necessary, however, for the woman to appeal to the praetor for an exceptio where it was sought to enforce such acts against her. This equitable relief was

¹⁸³ She may dispose of her separate estate as if single (Acts, 1893, c. iii, §§ 2, 3); may make deposits in banks and withdraw same (*ibid.*, § 8); may become stockholder in any company, except mutual life insurance companies (*ibid.*, § 9); and may insure husband's life for her own benefit (*ibid.*, § 5).

¹⁰⁴ She may dispose of her separate estate as if single (An. St., 1889, § 2342; Laws, 1895, c. 86); may make deposits in banks and withdraw same (An. St., 1889, § 2020; cf. Laws, 1895, c. 160, § 1) and may contract policies of life insurance (Laws, 1891, c. 376).

¹⁰⁶ She may contract in reference to her property in the same manner as if unmarried (Act, June 1, 1896, § 4, U. S. Stat. at Large, vol. 29, p. 193), and may perform any labor or services for her sole and separate account (*ibid.*, § 3).

¹ Dig., 16, 1; Cod., 4, 29.

² Sohm, Inst., § 53, p. 269.

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not accorded in cases where the conduct of the woman had been such as to prejudice the rights of innocent parties. In this way, as well as through legislation, exceptions to the rule were established.³ In the legislation of Justinian a distinction is made between the intercession of a woman for her husband and her intercession for third parties. Thus, a woman's contract of surety may be valid if it has been made in a formal manner, but if it has been entered into by a married woman for the benefit of her husband, it is invalid; notwithstanding the observance of such form, unless it is clearly shown that the money has been applied to the benefit of the wife.⁴

In those legislations which subject the contracts of the wife to marital authorization, no particular provisions are necessary respecting her intercession in behalf of third parties. She is, in general, prevented from engaging herself without the consent of her husband But, aside from specific limitations, there is no security against the undertaking of such liability for the benefit of her husband, and, in states recognizing the general contractual capacity of the wife, the same is true of her engagements for third parties as well of those which she undertakes for her husband.

Some of the states contain positive prohibitions upon the intercession of married women. The restriction in some legislations applies only to her undertakings for the benefit of her husband,5 while in others it extends to the assumption of liability for any person.6 A number of states recognize

⁸ Windscheid, Pandekten, vol. ii, §§ 485-487. Cf. Dig., 16, 1; Cod., 4, 29.

⁴ Nov., 134, c. 8; Windscheid, Pandekten, vol. ii, §§ 488, 489.

⁶ Ala. Code, 1896, § 2529; La., C. C., 126-128, 1790, 2398; N. H., P. S., 1891, c. 176, § 2; Vt., but a mortgage given for such purpose is valid, Stat., 1894, § 2646.

⁶ Geo., Code, 1885, § 2488; Ind., An. St., 1894, § 6964; Ky., unless estate is set aside for that purpose by deed or mortgage, Stat., 1894, § 2127; N. J., Act Mch. 27, 1874, § 5, Rev., 1877, p. 637, but if married woman obtains anything of value

the probability of undue influence, but consider that sufficient protection will be accorded the wife if she is given a special guardian in such cases,7 or if these acts are required to be executed before the court or are made dependent upon judicial authorization.8 The majority of the legislations, however, contain no particular limitations upon the capacity of the married woman to contract such obligations.9 The principle followed is that in the normal marriage mutual love and confidence will be sufficient protection for the wife, and that where this condition does not exist, a legal limitation will not furnish adequate security. Under such circumstances means will be found for disposing of the wife's property or obliging her in a different manner for the husband's benefit.

§ 5. Donations between Married Parties.

Donations between married parties have been the subject of particular restrictions in most legal systems. Such limitations may be imposed in the interests of third parties, or may be intended to regulate gifts as between the parties themselves. It is a principle, universally recognized, that

on the faith of the contract she will be liable thereon, Act, June 13, 1895, Laws, p. 821; S. C., C. S. L., § 2167; Argovie, Stat. Apl. 29, 1877, art. I, An. étran., vol. 7, p. 619; Lucerne, Stat. Nov. 26, 1880, art. 16.

⁷ Cf. references to Swiss cantons, ante, § 3, note 20.

⁸ Geneva, Lardy, Législations Suisses, p. 105; Norway, Stat. June 29, 1888, art. 13; Saxony, B. G., § 1650 seq. Cf. Italy, C. C., 136.

⁹ Cf. ante, § 3. The Prussian Landrecht originally contained the requirement for judicial execution of contracts whereby a wife engages herself for the benefit of her husband. This provision was abrogated by a statute of Dec. 1, 1889, which repealed as well the provisions of the common law and provincial statutes concerning the intercession of women. G. S. S., p. 1169. In the Canton of Basle City, a statute of Oct. 16, 1876 (art. 5, An. Etran., vol. 6, p. 571), abolished the rule which required that the wife should be assisted by a third party where she becomes surety for her husband. In Russia, a wife cannot draw or assign bills of exchange without husband's consent. Leuthold, R. R., § 24.

transactions made for the purpose of defrauding creditors or purchasers are attackable by such parties. Many systems, however, go further and impute fraud where a debtor makes gratuitous transfers of his property to his spouse or to other members of his family. This principle was introduced in English law by the statute of 13 Elizabeth, c. 5, which has been generally followed in the United States. Such transactions will be invalid as regards existing creditors who show that their debtor's financial condition was such as to justify the presumption that the donation would contribute to his insolvency.

The statutory introduction of separate property rights for married women had a tendency to promote acts in fraud of creditors. Accordingly, in some cases, all dispositions between husband and wife have been subjected to special limitations.² Some statutes have also enacted positive restrictions upon gifts of the husband to the wife. The general provision is that such gifts shall not become the separate property of the wife.³ Statutes, also, that have granted the married woman the right to hold the proceeds of insurance policies, drawn in her favor, upon the life of her husband, free from the claims of the latter's creditors, have frequently provided a maximum premium that may be paid

¹ Schouler, H. & W., §§ 372-374.

² Cf. references ante, § 3.

³ Col., An. St., 1891, § 3007; Kans., G. S., 1889, § 3752; Neb., C. S., 1891, § 1411; N. H., P. S., 1891, c. 176, § 1; Vt., Stat., 1894, § 2647; W. Va., Code, c. 66, § 3, as enacted by Acts, 1893, c. iii; Wy., R. S., 1887, § 1558. Cf. Del., Laws, vol. 15, c. 165, § 1, in R. C., 1893, p. 600; Md., Laws, 1898, c. 457, § 1. In Massachusetts, gifts between husband and wife are forbidden except that former may give latter articles of personal use not to exceed \$2,000 in value. P. S., 1882, c. 147, § 3 as amended by Acts, 1884, c. 132. In the District of Columbia they become her separate property but are liable for the debts of the husband existing at the time the gift is made (Act, June 1, 1896, § 1, U. S. Stat. at Large, vol. 29, p. 193). Under former rule such gift did not become her separate property (Dist. of Col., R. S., 1873-74, § 727).

upon such policies. If the annual premium exceeds this amount the excess may be taken to satisfy the obligations of the husband.

The European bankruptcy laws have followed the same principle in enabling creditors to attack gratuitous dispositions of the debtor in favor of his spouse where such transactions have been made within a limited period before the opening of the bankruptcy proceedings.⁵ Moreover, by an application of the *praesumtio Muciana*, it is the general rule that the wife of the bankrupt must prove that property which she has acquired during the marriage, has not been purchased with her husband's money.⁶

A similar provision, primarily intended for the protection of creditors, raises the presumption that movables found in the possession of the husband⁷ or, in some cases, of either of the married parties,⁸ belong to the husband. In case community of property obtains, a general presumption is raised that existing goods belong to the common mass.⁹ An

⁴ Cf. post, § 38, note 27. N. Y., Laws, 1896, c. 272, § 22; Ohio, R. S., 1891, § 3628; Vt., Stat., 1894, § \$ 2653-2657; W. Va., Code, 1891, c. 66, § 5, as amended by Acts, 1893, c. iii; Wis., An. St., 1889, § 2347 as amended by Laws, 1891, c. 376; Hawaii, C. L., 1884, p. 429; cf. Oklah., R. S., 1893, § 3080; Act 33 & 34 Vict., c. 93, § 10; Act 43 & 44 Vict., c. 26, § 2; Act 45 & 46 Vict., c. 75, § 11.

⁵ Germany, Kon. Ord., § 32, R. G. Bl., 1898, p. 619; Lehr, Droit Russe, pp. 42, 43; Leuthold, R. R., p. 357; Alexander, Konkursgesetze, pp. 36, 127, 254, 492; cf. France, Code de Com., 564.

⁶ Dig., 24, 1, 51; Germany, Kon. Ord., § 45, R. G. Bl., 1898, p. 621; France, Code de Com., 557-562; Leuthold, R. R., p. 357; Alexander, Konkursgesetse, p. 185; Dunscomb, Bankruptcy, p. 78.

[†]Saxony, B. G., § 1656; Norway, only as regards third parties, Stat. June 29, 1888, art. 21.

⁸ Germany, only in favor of creditors, B. G., § 1362; Prussia, A. L. R., ii, 1, § 544; Russia, belong to the bankrupt, Lehr, *Droit Russe*, p. 43. *Cf.* Austria, B. G., § 1237; Nevada, G. S., 1885, §§ 501–503.

⁹ Germany, B. G., § 1528; Prussia, A. L. R., ii, 1, §§ 400, 401. *Cf.* France, C. C., 1499; Italy, C. C., 1437; Spain, C. C., 1407; La., C. C., 2405.

exception arises respecting things intended for the personal use of the wife.¹⁰ For such objects the German code raises the presumption of the wife's ownership, not only as between the parties, but also as regards creditors.¹¹

Donations, which do not affect the rights of third parties, may, nevertheless, be restricted as between the parties themselves. The chief cause for such limitations has been the consideration that one of the parties, under the strong influences arising from the conjugal relation, may be led to make extravagant and unreasonable benefits for the other party. Another motive has been the principle that in the true marriage everything should be for the common benefit. To permit gifts would be to introduce a selfish element which would injuriously affect the ideal unity established by the marriage.

The Roman law prohibited gifts between married parties. It was probably influenced by considerations of the community of interests established by the union of the parties, but the chief basis of the rule, as it is recognized in the law of Justinian, is the desire to protect married parties against the undue influences connected with the intimate relation into which they have entered.¹² This consideration receives additional force as a result of the existence of the Roman institution of free divorce. In the absence of restrictions upon donations, it would have been possible for an unscrupulous spouse to obtain benefits as a result of the affection and confidence of the other, and then, by exercising the right of divorce, leave such party despoiled and helpless.

There were many exceptions to the general rule of Roman law that donations between husband and wife are invalid. Thus, it was recognized that gifts of articles for personal use

¹⁶ Germany, B. G., § 1362; Saxony, B. G., § 1656; Norway, Stat. June 29, 1888, art. 22; Russia, Lehr, *Droit Russe*, p. 43.

¹¹ B. G., § 1362.

¹⁹ Dig., 24, I, I seq.

or those made on customary occasions are valid.¹³ Moreover, the act of donation is not void, but voidable at the option of the donor, and if he dies without having demanded the return of the gift the title of the donee cannot be impeached.¹⁴

The early German law imposed no restrictions upon gifts between married parties, but such transactions were effective only to the extent that the wife's individual title to property was recognized.¹⁵ Some of the modern legislations, however, have recognized the rule of Roman law.¹⁶ The French civil code reaches the same end in a slightly different manner. Donations between husband and wife are permitted, under certain restrictions as to amount,¹⁷ but they are always revocable by the donor, and, for such revocation, the married woman does not require the marital authorization.¹⁸ In some of the states the general regulations governing contracts between married parties will restrict acts of donation between them.¹⁹

The rule of German law has been followed in other states, and gifts between husband and wife are determined by the same principles as obtain for donations between strangers.²⁰ The fiction of unity in the English common law prevented gifts as well as other transactions between married

¹⁸ Windscheid, Pandekten, vol. ii, § 509.

¹⁴ Ibid.

¹⁵ Schröder, Lehrbuch, pp. 728, 729.

¹⁶ Italy, C. C., 1054; Spain, C. C., 1334, 1335; Saxony, B. G., §§ 1647, 1649, 1694; Finland, Stat. Apl. 15, 1889, c. iii, art. 6. In Norway donations to be valid must be made by marriage contract, unless they consist in objects for personal use or life insurance policies or annuities. Stat. June 29, 1888, art. 24.

¹⁷ France, C. C., 1094, 1098.

¹⁸ Ibid., 1096.

¹⁹ Cf. references, ante, § 3.

³⁰ Austria, B. G., §1246; Prussia, A. L. R., ii, 1, §§ 310, 311; Russia, Leuthold, R. R., pp. 59, 60. No particular restrictions are placed upon donations between married parties in the code of Germany, and hence the above rule obtains in this system.

parties. In equity, however, where this fiction is not recognized, such acts will be sustained if the gift has passed from one into the possession of the other.²¹ Executed gifts cannot generally be revoked except under circumstances which would justify a revocation between strangers, but the court will more readily impute fraud or mistake in gifts from wife to husband than in ordinary cases.²² The provisions of the married women's acts, that gifts from the husband to the wife shall not become her separate property,²³ while primarily established in the interests of third parties, will affect the transactions as between the parties themselves. The husband's common law rights attach to the objects, and, if the latter consist of personal property, the husband may regain full ownership in the same.

§ 6. The Married Woman as a Trader.

The legal capacity of the married woman has been influenced also by the increased activity of women in industrial and commercial spheres. The majority of the legislations provide means whereby she can undertake a trade or business in her own name and on her own account. But in some European countries, the interests of the conjugal society as well as the system of matrimonial property relations have led to the requirement that the consent of the husband shall be necessary to the exercise of such functions. In Germany, the principle of the general capacity of married women enables them to carry on business even if the husband refuses his

¹¹ Schouler, H. & W., §383.

²² Ibid., § 390.

²³ See references, ante, note 3.

¹ France, Code de Com., 4; Prussia, A. L. R., ii, 1, §195; Saxony, B. G., § 1638. Tacit consent is sufficient: Germany, B. G., §§ 1405, 1452, 1519, 1549; Switzerland, Federal Law of Obligations, art. 35, An. tiran., vol. 11, p. 525. In Austria this consent will be supplied by the court if such activity will not endanger the rights of the husband; Stat. Dec. 17, 1862, R. G. Bl, 1863, pp. 1, 2; cf. general power of court to supply marital authorization, ante, § 3.

consent, but, in case his objections have been publicly made known, the acts of the wife will bind only her separate property. If the business requires personal service upon the part of the wife, the husband will be able to cause its cessation by appeal to the court.

Even before the passage of the married women's statutes, the English and American courts had recognized the wife's right, under certain conditions, to carry on a trade or business. The husband was entitled to his wife's services, but he could make her a gift of the same so far as such act did not violate the rules against donations in fraud of creditors. Where the married woman possessed a separate estate she could contract with reference to the same, and was entitled to the profits accruing therefrom. This did not include, however, the proceeds arising from the personal management of a trade or business. The latter were connected with the personal industry of the wife, and hence the consent of the husband was an essential element, though such consent might be implied, at least as between the parties themselves.

Under the married women's acts, the wife, so far as she has been granted general contractual capacity, may carry on a trade or business. This right has been limited in certain systems. In some of the states it is restricted to undertakings carried on for the support of the married woman and those dependent upon her, where the husband fails to provide such support.⁷ The authorization of the court or public notice or both are sometimes required.⁸

³ B. G., §§ 1405, 1435.
³ Ibid. §1358; cf. ante, § 3.
⁴ See ante, § 5.

⁶ See ante, § 3, note 48.
⁶ Schouler, H. & W., § 302 seq.

⁷ Idaho, R. S., 1887, § 5850 seq.; Mont., C. C. P., 1895, § 2290 seq.; Nev. G. S., 1885, § 534 seq.; Wis., An. St., 1889, § 2344; cf. W. Va., Acts, 1893, c. iii, § 14.

⁸ Idaho, see preceding note; Mont., *ibid.*; Nev., *ibid.*; Fla., R. S., 1885, §1505 seq.; Mass., Acts, 1898, c. 416; in North Carolina, the written consent of the husband is required, Code, 1883, § 1827 seq.

While the legislations differ with respect to the conditions under which the married woman may acquire the right to carry on a trade or business, there is general agreement that the capacity, when once acquired, is as extensive as that possessed by an unmarried woman. The disabilities and privileges of the wife do not apply to married women traders.9

§ 7. The Married Woman's Capacity to Sue and be Sued.

The circumstances which produced restrictions upon the contractual capacity of the married woman led to limitations upon her power to conduct a judicial proceeding. The Roman law and modern legislations, in the practical elimination of sex as a basis of private legal capacity, and the creation of separate property rights for the married woman, have removed the chief conditions which gave occasion for such restrictions. Hence, the tendency has been to grant the married woman the general capacity to sue and be sued, subject to qualifications with respect to particular matters.

The limitations which continue to exist are justified, in general, by considerations of domestic unity and harmony and of the preservation of the matrimonial property relations. These considerations, as well as a survival of the conception of the natural incapacity of the sex, affect the provisions of the French code and of those statutes that have been largely influenced by it. The married woman is subjected in this capacity to the same general restrictions that are imposed upon her power of contracting obligations. The marital authorization must be obtained before the wife

⁹ Germany, B. G., § 1405; France, Code de Com., 5, but a married woman, even if a trader, cannot plead in her own name without marital authorization, C. C., 215; Switzerland, Federal Law of Obligations, art. 35, An. étran., vol. 11, p. 525; Louisiana, C. C., 1786; Leuthold, R. R., p. 199; cf. Windscheid, Pandekten, vol. ii, §§ 486-488; Schouler, H. & W., § 310.

can become a party to a civil proceeding.² In all cases she may appeal to the court from the husband's refusal to grant his consent.² Moreover, the marital authorization is not required for legal proceedings which the wife undertakes for the protection of her property against the husband.³

The states which accept the principle that the general capacity of the woman is not affected by the marriage, recognize the right of the wife to carry on judicial proceedings. The interests of the husband are safeguarded by the provision that such acts will not be binding upon the matrimonial property unless his consent or joinder has been obtained.⁴

At English common law the married woman cannot undertake an independent suit at law. In all cases, except where she has acquired the position of a femme sole by reason of the civil disabilities of her husband, she must join with the latter in such a proceeding. In courts of equity the opposition of interests between husband and wife is recognized. This does not invest the latter with the capacity of conducting legal proceedings, and hence she must always be represented by a trustee or next friend.

The acts creating a statutory separate estate for married women generally carried with them an express or implied grant of capacity to carry on legal proceedings with refer-

¹ France, C. C., 215; Italy, C. C., 134; Spain, C. C., 60; La., C. C., 125.

² France, C. C., 218, 219, 222, C. C. P., 861, 862; Italy, C. C., 136; Spain, C. C., 60; La., C. C., 124, 132.

³ France, C. C., 1443, 1563; Italy, C. C., 1418, 1442; Spain, C. C., 60; La., C. C., 2391, 2425.

Germany, Civilprosessordnung, § 52, R. G. Bl., 1898, p. 419, B. G., § 1400. In the interests of domestic harmony, the wife is not permitted to proceed against the husband for claims arising out of his administration of the matrimonial property until after the end of such administration. This does not prevent her from taking measures for the security of her property, B. G., § 1394; Austria, Civilprosessordnung, § 1, R. G. Bl., 1895, p. 365; cf. Prussia, A. L. R., ii, 1, §§ 189, 230; Saxony, B. G., § 1638; Finland, Stat. Apl. 15, 1889, c. ii, arts. 3, 5.

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ence to the same. The legislation upon the subject is not uniform and its scope has not been fully determined. Some of the states limit the capacity to matters affecting the separate estate of the married woman, while others extend it to proceedings affecting her person or character. In a few legislations, positive enactments require the joinder of the husband in suits to which the wife is a party, while some permit and others prohibit such joinder. Despite the particular differences, a general tendency may be noted to accord the married woman full capacity in this respect, wherever it will not affect the matrimonial property rights accorded to the husband. Most of the states have established the system of separate property between married parties, and in these states the wife is generally permitted to sue and be sued in all matters as a femme sole.5 A few states recognize the desirability of preserving the domestic unity from contentious proceedings by prohibiting suits between husband and wife, while others, in permitting such suits as regards property, forbid either party to sue the other for a tort.

A feature of interest in this connection is the fact that special privileges which were accorded to the wife on account of her incapacity to sue, have not always been repealed with the removal of such disability. Following an old English statute, most of the states granted the married woman an immunity from the effects of statutes providing for the limitations of actions. The running of the period of limitation was suspended during coverture. The acts granting the married woman capacity to carry on legal proceedings did not generally provide for the repeal of such privileges. Where the statute provided that the running of the period of limitations should be suspended until after the dis-

⁶ See references to English and American statutes, ante, § 3.

abilities of coverture were removed, it would seem that its provisions could not be taken advantage of by a married woman who has complete capacity for carrying on legal actions. The later revisions of statutes show a tendency to eliminate the provisions granting these privileges to married women.

§ 8. Right and Duty of Household Administration.

All countries recognize the marriage as establishing a community of life between the married parties. It is also the rule that the husband is the head of the family and has the right of determining respecting the affairs of the family household, the wife being under a general obligation to assist him in such administration. The question arises respecting the extent to which the wife has a right as well as a duty of acting within the field of household affairs. The question is affected by the distribution of the burden of the family expenses. Where these are primarily or exclusively supported by the husband, the wife's right of administration is subjected to marital authorization or entirely excluded. If the wife assists in bearing these expenses she is generally recognized as having a certain right of administration.

Some European legislations recognize the right of the wife to act in matters pertaining to the ordinary support of the family. This is based upon the principle that she is acting as the agent of the husband, and hence, where the latter manifests a contrary desire, this capacity of the wife will be excluded.

The English common law followed a similar principle in permitting the married woman to contract for necessities

¹ Where this principle is not recognized in positive statutes, it will generally be supplied by the courts. In Spain it does not appear that the husband can deprive the wife of such right. See also, Basle, Stat. Mch. 10, 1884, arts. 7, 34; Finland, Stat. Apl. 15, 1889, c. iv, art. 2.

upon the credit of her husband." If the presumption of agency is contradicted by positive statements of the husband or by the fact that he has furnished sufficient necessaries for the support of the family, he will not be liable for such contracts of his wife. A tendency has appeared to make the rule more favorable for the wife. If the husband does not provide the necessities, third parties may furnish them to the wife despite the prohibition of the husband.3

In Germany and some of the Swiss cantons the married woman is accorded a more extensive right of household administration. Thus, the wife's acts of customary household management, even though concluded without the marital authorization, will be binding upon the husband. some of the older legislations it is recognized that the husband can relieve himself from this obligation for the future by a public declaration, before the court, that the wife shall not possess such authority.4 The new German code and the draft code of Switzerland give the wife a positive right of household administration.5 The former permits the husband to limit or exclude this function of the wife, but the court may reinstate her in such capacity if it considers that the husband has abused his power. The draft code of Switzerland, following the Lucerne statute of November 26, 1880, goes a step further than the German code. It considers the married woman as having full capacity of household administration until she has been deprived of the same by judicial decree.6 This position meets the demands of

Blackstone, Comm., vol. i, p. 442; Pol. & Mait., Hist., vol. ii, p. 402.

⁸ Kent, Comm., vol. ii, p. 149; cf. La., C. C., 1786; Hawaii, Laws, 1888, c. xi, § 7.

Prussia, A. L. R., ii, 1, § 323; Glaris, L. B., ii, art. 175; Zürich, P. R. G., § 603; in Saxony the declaration must be known to the third party, B. G., §§ 1645, 1699.

Germany, B. G., §§ 1356, 1357; Switz., Vorentwurf, 180, 182; a statute of November 26, 1880, art. 15, established the same principle in the canton of Lucerne (An. ètran, vol. 10, p. 488).

⁶ Switz., Vorentwurf, 183; Lucerne, Stat. Nov. 26, 1880, art. 15.

the representatives of the German society "Frauenwohl." 7 The "Rechtsschützverein für Frauen," in Dresden, insists, however, that each party shall have equal capacity of household administration, and shall bind the other to the extent that the latter has not renounced such liability by public declaration before the court. 8

⁷ Sera Proelsz und Marie Raschke: Die Frau im neuen bürgerlichen Gesetsbuch,

See Das deutsche Recht und die deutschen Frauen, p. 7.

PART II.

MATRIMONIAL PROPERTY SYSTEMS.

CHAPTER I.

CLASSIFICATION.

§ 9. In General.

AT first glance the different classes of matrimonial property systems appear innumerable. The local customs which continued to govern the family relations in Europe after the reception of Roman law, were developed into a multitude of particular systems. But the modern codification movement has brought about a greater degree of uniformity. It is clear, moreover, that underneath the differences occasioned by the accidental circumstances attending their growth, many of the systems have essential features in common.

The question of title or ownership, which is the most essential element in any kind of property relations, furnishes the most fundamental basis for a classification of matrimonial property systems. Accepting this as a principle, the numberless particular regimes may be grouped under the two general divisions of communal and individual systems. The first class includes all the systems which recognize common ownership of any general part of the property of the married parties, while all other systems fall under the second division.

The value of the above classification is not affected by the

fact that under an individual system the husband and wife may hold property in common. Particular instances of common ownership do not determine the general character of the system. If, however, the communal principle is applied to any general part of the property of either of the parties, the system must be distinguished from those falling under the individual class, notwithstanding that the parties may hold property by individual title.

The systems grouped under one of these two divisions, possess in common the characteristic feature which distinguishes them from those falling under the other class. Within each division, however, fundamental differences among the systems furnish the basis for further classification.

§ 10. Communal Systems.

The most natural basis for classifying communal systems is to be found in the extent or scope of the principle of community. Upon such basis two divisions may be formed. The general community of property (allgemeine Gütergemeinschaft; communauté universelle) embraces all systems in which the principle of common ownership is applied to the entire fortune of each of the married parties. Limited or particular community includes those communal systems in which a general class of property is excluded from the common ownership.

The number of forms of limited community is restricted only by the capacity to develop new modifications of the communal principle; but, as they have been defined in the important legislations, they fall under the classes of community of acquisitions (*Errungenschaftsgemeinschaft; communauté réduite aux acquêts*) or community of movables and acquisitions (*Fahrnissgemeinschaft*). Under the former the ownership of the individual property which either party

possesses at the beginning of the community is not affected, but the income and profits of such property and, in general, everything that is acquired by either party during the existence of the community, becomes common property. The system of community of movables and acquisitions is the same as the above, except that the ownership of the movables which either party possesses, at the beginning of the community, becomes common.

Some of the other principal types of limited community are indicated in the civil code of France. They are characterized by the provisions for partial or complete exclusion of movables; inclusion of immovables by fictitiously treating them as movables; exclusion of ante-nuptial debts; exclusion of objects gratuitously acquired; a privilege for the wife of resuming her contributions without loss at the close of the community; special privileges for the survivor, and for unequal shares in the community.

§ 11. Individual Systems.

These systems do not differ among themselves with reference to the application of the principle of individual ownership. The property, in general, under all of such systems, continues to be held by individual title. The individual property systems, however, differ among themselves respecting the nature and extent of the interest which either party, by virtue of the marriage, acquires in the property of the other. In accordance with this test four subdivisions of this group may be obtained:

I. System of Exclusive Rights of the Husband;

The husband is entitled to the complete control and, aside from exceptions arising from peculiar circumstances, to the ownership of the property of the wife. The individual title of the wife is transferred to the husband.

¹ France, C. C., 1497 seq.

II. System of Marital Administration and Usufruct;

The husband has the administration and is entitled to the fruits and profits of the property of the wife. The latter, however, retains the individual ownership of her property.

III. System of Dowry;

The marriage does not affect the property of the parties, but it is customary for the husband to receive a contribution to assist him in supporting the expenses of the common household. He does not acquire an absolute title, but he has the right of administration over the dowry, and is entitled to the proceeds arising from the same.

IV. System of Separate Property;

Neither party acquires, by virtue of the marriage, any right or interest in the property of the other. The title and the use and administration of the fortune of each party remains unaffected by the marriage.

CHAPTER II.

REGULATION BY MARRIAGE AGREEMENTS.

§ 12. General Freedom to contract such Agreements.

The capacity of the parties to determine the property relations that shall exist between them is a consideration of fundamental importance, Two opposing principles appear in this connection. On one hand there is the desirability of uniformity, particularly in the interests of third parties. On the other hand, there is presented the great value of allowing free scope to individual traits and wishes in this field of human relationships. Any determination which is made of this question will be influenced by both of these considerations.

In considering the attitude of the states respecting marriage agreements, it will be necessary to distinguish between those which are concluded before the marriage and those which are entered into after the relation has been established. All of the important states permit the regulation of matrimonial property relations by ante-nuptial agreements between the parties. The legal disabilities resulting from the marriage do not attach until the relation has been

¹ Many of the Swiss cantons do not permit the matrimonial property relations to be regulated by agreement of the parties. Alterations of the statutory system can obtain only to the extent that they have the effect of contracts of inheritance. In certain cases the court is authorized to approve alterations for specific reasons. For chart showing attitude of cantons respecting marriage contracts see Lardy, Ligislations Suisses, Appendix; see also, Lucerne, Stat. Nov. 26, 1880, art. 27; Zürich, P. R. G., §§ 615–619. The draft code of Switzerland permits the parties to determine their legal property relations by contract, Vorentwurf, 195.

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entered upon. Prior to that time the parties may make any contract respecting property that may be made between strangers. This general rule is subject to particular exceptions which will be considered in a subsequent section.²

The widespread acceptance of the above principle indicates its essential value, It is at once an indication of the difficulty of defining a perfect system, and a recognition of the necessity of affording considerable freedom to the influence of local customs and individual characteristics in the field of matrimonial relations.

These general considerations have not, however, received full application in all cases. A distinction is made in some systems between ante-nuptial and post-nuptial agreements. Particular considerations are involved in the case of contracts concluded after marriage, hence such agreements may be subjected to restrictions or absolutely prohibited. The grounds for such departure from the general principle are for the most part the same as those previously considered as the basis for restrictions upon general transactions between husband and wife.³ Fear exists that one of the parties will use his influence over the other for selfish advantage, or it is desired to protect third parties against collusive acts of married parties.

The Civil Code of France and those systems that have adopted its provisions or have been strongly influenced by it,4 generally provide that after the marriage ceremony has been performed, a contract regulating the property relations of the parties cannot be entered into, and that an antenuptial contract cannot be altered or modified by any sub-

² Post, § 14.

See ante, §§ 3-5.

⁴ France, C. C., 1395, 1543; Italy, C. C., 1385, 1391; Spain, C. C., 1320; Finland, Stat. Apl. 15, 1889, c. iii, art. 6; Basle, Stat. Mch. 10, 1884, art. 17; Ariz., R. S., 1887, § 2099; La., C. C., 2329; Texas, R. S., 1895, art. 2965.

sequent agreement.⁵ To the extent that the American systems have retained the common law prohibition upon contracts between husband and wife, the same rule obtains.⁶

On the other hand, those systems that impose no general limitations upon contracts between husband and wife permit the regulation or modification of matrimonial property relations by post-nuptial agreements between the parties.⁷

§ 13. Statutory and Contractual Systems.

As a rule the states of continental Europe, in addition to determining the property relations that shall obtain between the husband and wife, where they have failed to enter into a marriage agreement (gesetaliches Güterrecht; régime légal), make provision in the codes for one or more systems that may become operative as a result of a contract between the parties (vertragsmässiges Güterrecht; régime conventionnel). The immediate occasion for the existence of such provisions was the condition of the law regulating matrimonial property relations before the adoption of the modern codes. Within a single state, a large number of different systems obtained by force of local customs or statutes. This condition may be explained on one hand as the result of feudal decentralization, and on the other by the greater resistance to the reception of Roman law in the field of

⁵ A general exception permits the parties to re-establish community of property which may have been dissolved by separation of goods. France, C. C., 1451; Italy, C. C., 1443; Spain, C. C., 1320; Finland, Stat. Apl. 15, 1889, c. v, art. 17.
⁶ Cf. references ante, § 3.

⁷ Austria, B. G., § 1217; Germany, B. G., 1432; Prussia, A. L. R., ii, 1, §§ 215, 251, 355, 412, 419, 439, but exceptions arise where the contract establishes community of goods or where it provides for the exclusion of such community in districts where the latter exists by force of local statutes, though community existing as a result of contract may be dissolved or modified by post-nuptial agreement, ibid., ii, 1, §§ 354 seq., 412 seq.; Saxony, B. G., § 1691; Norway, Stat. June 29, 1888, arts. 3, 4; Leuthold, R. R., pp. 59, 60; cf. references to English and American statutes, ante, § 3.

family relations. In Germany, before the adoption of the present code, more than one hundred matrimonial property systems were given statutory recognition. Similar conditions had existed in other European states before the nationalization of the law was accomplished. While the variations in some cases were of slight importance, in other cases the differences among the systems were fundamental.

It was recognized that a sharp break with the old customs and legislations would produce hardships, and that mere freedom of contract would not be sufficient to overcome this condition so far as the mass of the population was concerned. Individuals, who desired a system differing from that established by the code, would be obliged to set forth in detail the terms under which they desired to have their property relations regulated. A failure to express themselves clearly might frequently lead to results the reverse of those desired. The German code commissioners considered various plans for the solution of this difficulty. One proposal was that the local customs and statutes should be continued in the field of matrimonial property relations. This policy had been followed by Prussia and other German states as they absorbed neighboring communities, and by Russia with respect to Finland and other Swedish and Polish provinces.² Another plan proposed to divide Germany into districts and establish for each district, as a statutory system, that which obtained among the majority of the people within such territory. It was also proposed that the legislative authority of each commonwealth should be permitted to determine which of several systems defined by the federal code, should obtain within its jurisdiction.3

¹ Denkschrift, p. 450. Cf. Neubauer, Deutschland.

³ Neubauer, *Deutschland*, pp. 1 seq., 66, 209 seq., 228, 231, 233, 240; Neubauer, Ausland, pp. 22-24.

³ Gierke, *Entwurf*, p. 111 seq.; Bähr, "Das eheliche Güterrecht des bürgerlichen Gesetzbuchs," Arch. f. bürg. Recht., vol. i, p. 237.

These proposals met with serious objections on the ground of the practical difficulties as well as from considerations of the interests of national unity.4 They have not been accepted in the more modern codes which undertake to remove the inconveniences arising from the establishment of a single statutory system by giving legal definition to several systems. One of these, probably that which obtains among the greater number of people or which corresponds most closely to their social ideas and institutions, is established as the statutory system. It comes into operation, however, only in so far as the married parties have failed to indicate a different desire.5 Any one of the other systems may be introduced by marriage contract. The simple indication of the title of the system will be sufficient to bring its provisions into operation. In this way the freedom of contract is made much more effective.

The beneficial character of this policy is manifested by the widespread acceptance which it has received. The following table indicates the statutory and contractual systems that have been defined in the legislations which have been brought under consideration in the present study:

⁴ Motive, vol. iv, p. 133; Denkschrist, pp. 270, 271; Mitteis, "Bemerkungen zum ehelichen Güterrecht," Zeit. f. d. privat. u. öff. Rechts., vol. 16, p. 562.

⁶ In a certain sense two statutory systems exist in legislations which recognize a legal or judicial separation of property in case of community of goods, marital administration and usufruct or dowry. Where such separation occurs, the regime of separate property becomes the matrimonial property system by operation of law. Post, §§ 24, 31, 36.

⁶ The codes which recognize the system of dowry practically define the system of separate property in providing for the constitution and administration of the paraphernalia. *Post*, §32.

Code or Statute.	Statutory System.	Contractual Systems.
France, C. C.	Community of Movables and Acquisitions (art. 1393).	General Community, Community of Acquisitions, and six other forms of Limited Community (art. 1497 seq.); Marital Administration and Usufruct (art. 1592 seq.); Dowry (art. 1540 seq.); Separate property (art. 1536 seq.).*
Spain, C. C.	Community of Acquisitions (art. 1315).	Dowry (art. 1336).
Italy, C. C	Dowry (art. 1388 seq.).	Community of Acquisitions (art. 1438).
Austria, B. G	Dowry (§1218).9	General and Limited Community of Property (§ 1233 seq.).
Basle City (Stat. Mch. 10, 1884	1).General Community (art.	Separate Property (arts. 1, 28).
Geneva, C. C	Marital Administration and Usufruct (ii, arts. 172, 173) Marital Administration and	Same as France, C. C.
Zürich, P. R. G. 10	Usufruct (art. 4 seg.). Marital Administration and Usufruct (§ 589 seg.).	
Switzerland, Vorentwurf 11		General Community (art. 244 seq.); Community of Movables

[†]The provisions of the French Civil Code, or their substantial equivalent, obtain in Belgium and Geneva and before the adoption of the German code, were in force in Baden, Elsass-Lothringen and in districts of Prussia, Bavaria, Hesse, etc.

⁸ During the Middle Ages the community of acquisitions was in some places combined with the system of dowry, the profits of the dowry falling into the community (Viollet, *Précis*, p. 689). This composite system is recognized as a contractual system in France (C. C., 1581) and Italy (C. C., 1433), and will arise in Spain (C. C., 1315) and Louisiana (C. C., 2399) whenever dowry is established and no contrary provision is made.

⁹ Before the adoption of the German code, the system of dowry obtained in the territory of the common or Roman law to the extent that the latter had not been altered by statute. *Cf. Denkschrift*, p. 450.

¹⁰ Among the other Swiss cantons are to be found, in addition to those above indicated, the systems of community of acquisitions and of dowry. *Cf.* Neubauer, *Ausland*, pp. 1-7.

¹¹ The central government has been given the power to establish a uniform code of private law. So far as concerns family law and the law of persons, the action has not passed the initiatory stage.

and Acquisitions (arts. 264, 265); Community of Acquisitions (arts. 266, 267); Separate Property (art. 268 seq.).

Germany, B. G	General Community (§ 1437 seq.); Community of Movables and Acquisitions (§ 1549 seq.); Community of Acquisitions (§ 1437 seq.); Separate prop- erty (§§ 1436, 1426 seq.). General Community (ii, 1,§ 360);
Usufruct (ii, 1, § 205) 12	Community of Acquisitions (ii, 1, § 396); Separate Property (ii, 1, §§ 308, 221 seq.).
Saxony, B. G	General Community (§ 1695); Limited Community (§ 1703); Separate Property (§ 1693).
Norway, Stat. June 29, 1888 18. General Community, Finland, Stat. Apl. 15, 1889 Community of Movables and Acquisitions (C. i, art. 1 seq.). Russia 14	Separate Property.
England 18 Separate Property. United States of America, 18 All legislations except those indicated below, 18 Separate Property. Arizona, R. S., 1887	
California, C. C	
(§ 2497). Louisiana, C. CCommunity of Acquisitions (art. 2332).	Dowry (art. 2335 seq.),
New Mexico, C. L., 1897 17 Community of Acquisitions (§ 500). New Mexico, C. L., 1897 17 Community of Acquisitions	
(§ 2030 seq.). Texas, R. S., 1895	
(§ 1399).	

¹² Where provincial statutes established community as the statutory system the system of marital administration and usufruct became a contractual system.

¹³ Denmark recognizes general community, while in Sweden community is limited to movables and acquisitions. Neubauer, *Ausland*, p. 22.

¹⁴ Within the jurisdiction of the civil code. Lehr, *Droit Russe*, p. 42; Leuthold R. R., p. 59.

16 For English and American statutes, see references post, § 38.

16 For particular exceptions in Florida and Tennessee, see post, § 38.

17 Cf. post, § 17 (b), note 6.

The parties in accepting the statutory system or any of the contractual systems may, in general, introduce such modifications as they desire.²⁸ It will thus be a relatively easy matter to transform general community into a limited community, and either of these, as well as marital administration and usufruct, into a condition of separate property, even if such forms are not given statutory definition as contractual systems.

To guard against confusion and indefiniteness the parties are forbidden to provide in general terms for the regulation of their property relations by local customs or foreign laws. They must accept one of the systems defined in the code, or set forth in detail the rules according to which they desire their economic interests to be governed.²⁹

§ 14. Particular Provisions Respecting Marriage Contracts.

The exercise of the general right of determining matrimonial property relations by contract is subject to certain conditions imposed in the interest of the family or of third parties. A common provision is the requirement of special forms in marriage agreements. It is very generally the rule that the agreement shall be reduced to writing and signed by the parties. This principle was established in English law, so far as regards executory agreements, by the fourth section

18 In Finland the system of separate property cannot be introduced by contract. Stat. Apl. 15, 1889, c. i, art. 4; in Germany the provisions respecting the continuation of the community between the survivor and the common children may be excluded, but cannot be otherwise altered in any manner. B. G., §§ 1508, 1518; in Italy the parties are forbidden to contract for any community other than that of acquisitions. C. C., 1433, cf. ibid., 1434–1436; for limitations in Swiss cantons, see ante, § 12, note 1.

¹⁹ France, C. C., 1390; Italy, C. C., 1381; Spain, C. C., 1317; Germany, an exception arises in case the husband is residing in a foreign country at the time the contract is concluded. B. G., § 1433.

of the famous Statute of Frauds. It obtains in practically all of the states of the American union.

Most of the continental European legislations and some of the American statutes go further and require that the contract shall be drawn up before a notary or judge.² Witnesses are generally necessary and, in some cases, the act must receive judicial confirmation.

In addition, it is provided in many states that marriage agreements shall receive official publication or registration.³ The code of Germany has established a special matrimonial property register for such publication, and the draft code of Switzerland proposes a similar record.⁴ These requirements exist in the interest of third parties, and a failure to observe them will not generally affect the rights of the parties as between themselves.

A limitation upon the right of the parties to affect their mutual property relations sometimes occurs in connection with dispositions to take effect upon the death of one of the parties. Some legislations provide that marriage contracts

¹ Act 29 Car. ii, c. 3.

³ France, C. C., 1394 seq.; Italy, C. C., 1382 seq.; Spain, C. C., 1321 seq.; Austria, Stat. July 25, 1871, R. G. Bl., no. 76; Germany, B. G., § 1434; Prussia, A. L. R., ii, 1, §§ 198, 209, 356; Basle, Stat. Mch. 10, 1884, art. 17; Switz., Vorentwurf, 219, 220; Ariz., R. S., 1887, § 2098; La., C. C., 2328 seq.; Texas, R. S., 1895, art. 2964; Wash., G. S., 1891, § 1401.

^{*}Italy, C. C., 1384; Germany, B. G., § 1435; Prussia, in case of exclusion of community, A. L. R., ii, 1, § 422; Saxony, B. G., § 1695; Norway, Stat. June 29, 1888, art. 2 seq.; Finland, Stat. Apl. 15, 1889, c. iii, art. 1 seq.; Switz., Vorentwarf, 222 seq.; Ala., Code, 1896, § 1011; Ark., Dig. Stat. 1894, §§ 4898-4901; Cal., C. C., §§ 178-180; Geo., Code, 1895, § 2483; Idaho, R. S., 1887, §§ 2508-2511; Ill., An. St., 1885, c. 68, ¶9; Ky., Stat. 1894, § 2128; Mass., P. S., 1882, c. 147, § 2; Miss., An. Code, 1892, § 2294; Mo., R. S., 1889, §§ 6853, 6854; Mont., C. C., 1885, §§ 248-250; Nev., G. S., 1885, §§ 524-528; N. C., Code, 1883, §§ 1270, 1820, 1821; S. C., C. S. L., 1893, § 2168; Tenn., Code, 1884, §§ 2837, 2846; Hawaii, C. L., 1884, § 1263; so far as either party is a trader: Austria, R. G. Bl., 1863, pp. 3, 4; France, Code de Com., 67 seq.

Germany, B. G., §§ 1558-1563; Switz., Vorentwurf, 222-225.

shall not affect the rights of the survivor nor change the legal order of succession.⁵ Where the principle of the legal portion is recognized, the parties will generally be unable to modify the same either as regards themselves or their heirs.⁶

⁶ France, C. C., 1388, 1389, 1527; Italy, C. C., 1379, 1380, 1398; Ariz., R. S., 1887, § 2097; La., C. C., 2326; Texas, R. S., 1895, art. 2963; cf. Switz., Vorentwurf, 221.

⁶ Post, § 47.

CHAPTER III.

SYSTEMS OF COMMUNITY OF PROPERTY.

§ 15. Common, Dotal and Separate Property.

In considering the systems which recognize common property of married parties, it is necessary to distinguish three classes of property. Theoretically it would appear that the system of general community embraces only one kind of property, while limited community implies the existence of only two classes. In practice, however, most of the legislations define three distinct species under all kinds of community, and the freedom of contract tends to promote this division. These three classes may be characterized as common, dotal and separate property.

Common property includes all objects that fall into the common mass. It is held by the married parties in joint ownership, each of them having a right to an indivisible share of the whole. The profits and proceeds accruing from such property likewise belong to the common fund.

Property which is excluded from joint ownership and is held by individual title by either married party is either dotal or separate in character. These terms are chosen in the absence of more definite legal expressions. The codes, while recognizing the difference between the two kinds of property, generally include both under the class of property

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¹ The two latter classes, and, in particular instances, the first class also, will appear under individual as well as in communal systems. See post, chap. iv. 63

reserved from community (*Vorbehaltsgut*; biens réservés).² The first draft of the German code used the terms, "Sondergut" and "Vorbehaltsgut," to distinguish the two classes.³ The later drafts omitted the former term, and no particular expression was adopted for the characterization of such property under the system of general community,⁴ though the term, "eingebrachtes Gut" is applied to it under the systems of limited community.⁵

Dotal and separate property agree in that each is held by an individual title, but they differ with respect to administration and usufruct. Dotal property is administered for the benefit of both parties, and the profits and proceeds become common property.⁶ It differs from the latter only in the fact that the exclusive title of the individual owner is retained, and hence the capital of the property does not form a part of the common mass.⁷

Separate property, on the other hand, continues subject to individual administration and usufruct according to the general principles obtaining for the system of separate property.

§ 16. Composition of the General Community.

The general community of all property has been advocated as the only system that realizes the ideal of the mar-

² Under the systems of marital administration and usufruct as well as of dowry, the two classes are clearly distinguished by the terms, "dotal property" and "reserved property" or "paraphernalia."

⁸ I. Entwurf, §§ 1351, 1411 seq., 1432.

⁴ Germany, B. G., § 1439.

⁵ Ibid., §§ 1520 seq., 1550 seq.

⁶ Under individual systems, the proceeds of dotal property go to the husband alone.

⁷ France, C. C., 1428; Germany, B. G., § 1439; Prussia, A. L. R., ii, 1, § 370.

⁸ France, C. C., 1536; Germany, B. G., § 1441; Saxony, B. G., § 1693; Switz., Vorentwurf, § 215; cf. Prussia, A. L. R., ii, I, § 221.

riage as a union of all of the material and spiritual interests of the parties. By virtue of the establishment of this system, all of the property which the parties possess is united into a common mass, to which is also added all of the property which either of the parties later acquires.² The joint title is substituted for the individual title without the necessity of a formal transfer.

The general rule has been subjected to numerous exceptions and modifications, and the perfect form of general community is not defined to-day in any important legislation. The legislations generally recognize that property may be excluded from the community by operation of law, by act of a third party or as a result of agreement between the parties.

The property of either party, which, by reason of entail or any limited title, cannot be alienated, is under statutory provision excluded from the common ownership. It falls under the class of dotal property and is administered for the benefit of the community.² Another example of property excluded from the community by operation of law, is wearing apparel and property intended for the exclusive personal use of one of the parties.³ Most of the codes, however, do not establish this exception for systems of community. It is significant that the draft code of Switzerland provides that certain things shall become separate property, by operation of law, under all forms of matrimonial property relations. They include objects for exclusive personal use, the savings

¹ France, C. C., 1526; Germany, B. G., § 1438; Prussia, A. L. R., ii, 1, §§ 363, 371, 372; Saxony, B. G., § 1695; Switz., *Vorentwurf*, 244; Basle, Stat. Mch. 10, 1884, art. 2. In Austria the presumption is against the inclusion of future and inherited property, except it is expressly stipulated for each. B. G., § 1177.

² Germany, B. G., §§ 1439, 1525; Prussia, A. L. R., ii, 1, §§ 363, 370.

³ For the wife: Prussia, A. L. R., ii, I, § 364. For either party: Basle, Stat. M.ch. 10, 1884, art. 3; Switz., Vorentwurf, 217.

of the wife, goods used by the latter in an independent industry or profession, and that which she acquires by her labor. In Norway, also, where the general community has been greatly modified under the influence of modern conditions, it is the rule that a life insurance policy or annuity for the benefit of one of the parties, is his separate property unless express provisions exist to the contrary.

Property is excluded from the joint ownership when it is acquired by gratuitous title, as a donation or succession, and the donor or testator has provided that it shall not become common.⁶ The codes are not in harmony respecting the character of such property. According to the older codes, which emphasize the community of acquisitions, the property becomes dotal and the profits and income of the same accrue to the common mass as in the case of property excluded from community by operation of law.⁷ On the other hand, the more recent legislations regard such property as separate in character.⁸

The principle of community may be profoundly modified as a result of agreement between the parties. They may exclude property from the common ownership and establish it as dotal or separate in character. Where there is a simple declaration that certain objects shall be excluded from the common mass, it would appear that the dotal features will be impressed upon such property. If, however, the parties

Switz., Vorentwurf, 217.

⁵ Stat. June 29, 1888, art. 20; cf. France, Stat. July 20, 1886, post, § 18, note 10; Basle, Stat. Mch. 10, 1884, art. 21.

⁶ France, C. C., 1401; Germany, B. G., §§ 1440, 1369; Prussia, A. L. R., ii, I, §373; Saxony, B. G., § 1693; Switz., *Vorentwurf*, 216; Norway, Stat. June 29, 1889, arts. 20, 5; cf. Austria, B. G., § 1177.

¹ France, C. C., 1401, 1428; Prussia, A. L. R., ii, 1, §§ 371, 373, 405; Saxony, B. G., §§ 1693, 1695.

⁸ Germany, B. G., §§ 1440, 1441, 1369; Switz., Vorentwurf, 215, 216; Norway, Stat. June 29, 1888, art. 20.

clearly indicate an intention that the administration and enjoyment, as well as the title, shall be reserved from the matrimonial property, the goods become separate in character.9

By these means the composition of the community may be so materially modified as to be practically identical with that of one of the types of limited community or even of an individual system. The general regulations governing general community would nevertheless continue to apply as respects obligations, etc., so far as they had not been modified by agreement between the parties.

§ 17. Composition of Limited Community.

(a) Community of Movables and Acquisitions.

The community of movables and acquisitions is the statutory system of the Civil Code of France, and has received acceptance in other states as a statutory or contractual system.² The general principles at the basis of this system are much the same as those which obtain in connection with general community.² Its fundamental point of departure from the latter is to be found in the modification of the composition of the community. Not only those objects which fall under the class of dotal or separate property in general community,³ but also the immovables which either party possesses when the community arises, or subsequently

⁹ Germany, B. G., § 1440; Prussia, A. L. R., ii, I, § 360; Saxony, B. G., § 1693; Austria, B. G., § 1233; Norway, Stat. June 29, 1888, arts. I, 8; France, C. C., 1536. The French Civil Code makes a clear distinction between mere exclusion of community and the establishment of separate property. *Ibid.*, 1529-1539; Viollet, *Pricis*, p. 677 seq.

¹ See ante, § 13.

² The German code provides that this system shall be governed by the rules regulating general community so far as it is not otherwise expressly provided. B. G., § 1549.

^{*} Ante, § 16.

acquires by title of donation or succession, are excluded from the common mass and do not constitute a part of the community property.⁴ This exclusion results by operation of law and, in accordance with the general principle, such immovables become dotal and not separate property. The income and profits of such property, as acquisitions, not proceeding from donation or succession, accrue to the community.⁵

(b) Community of Acquisitions.

Under the system of community of acquisitions the common ownership is confined to such property as shall be acquired by either of the married parties during the existence of the community.⁶ Acquisitions generally include the profits and proceeds of property owned by either party at the time the community commences. Such property is considered dotal though it may be reserved for separate use by agreement between the parties.

On the other hand, acquisitions do not embrace all property accruing to the parties during the existence of the

⁴ France, C. C., 1402; Germany, B. G., § 1551; Switz., *Vorentwurf*, 264; Finland, the exclusion applies only to agricultural lands. In other respects this system agrees with general community, Stat. Apl. 15, 1889, c. i, arts. 2, 3.

⁶ France, C. C., 1401; Germany, B. G., §§ 1550, 1551; Finland, Stat. Apl. 15, 1889, c. i, art. 6; contra, Switz., Vorentwurf, 264, which makes such property separate in character. The parties may stipulate, however, that such property shall be subject to marital administration and usufruct, in which case the acquisitions accrue to the husband, and, under the rules of community, will become common. *Ibid.*, 265.

⁶ France, C. C., 1498; Spain, C. C., 1392; Italy, C. C., 1436; Germany, B. G., § 1519; Prussia, A. L. R., ii, 1, § 396; Switz., *Vorentwurf*, 266; Ariz., R. S., 1887, §§ 2100, 2102; Cal., C. C., §§ 162, 164; Idaho, R. S., 1887, §§ 2495, 2497; La., C. C., 1402; Nev., G. S., 1885, §§ 499, 500; Texas, R. S., 1895, arts. 2967, 2968; Wash., G. S., 1891, §§ 1397, 1399; in New Mexico, the community appears to be primarily intended as a provision for the survivor and to begin only at the dissolution of the marriage. Before that time it is a simple account between the parties, each remaining owner of his acquisitions. C. L., 1897, § 2030

community. That property which, under general community, is excluded from common ownership by operation of law, will likewise retain its individual character under the community of acquisitions and will be considered dotal property. The same rule generally obtains respecting property falling to either party by donation of succession so far as the donor or testator has not indicated a desire that it shall become common 8 or separate 9 in character.

Some of the American states that have established a community of acquisitions have limited it to the products of the personal industry of both parties. All property owned by either party at the time of the marriage, or acquired afterwards by donation or succession is declared to be the separate property of such party, and the increase and proceeds of the same have a like character.⁷⁰

Dotal property will also include all objects acquired as compensation for damages to or by way of exchange for property which has the dotal character.¹¹

Separate property is determined by the same general principles as were indicated in connection with general community,¹² but particular exceptions arise. Thus, the code of Germany excludes separate property of the husband under both forms of limited community.¹³ The individual title of

¹ Germany, B. G., § 1522; Spain, C. C., 1403, 1404; cf. ante, § 16.

⁸ France, C. C., 1498, 1401, 1402; Italy, C. C., 1435: Spain, C. C., 1396; Germany, B. G., §1521; Prussia, A. L. R., ii, I, §§ 402, 405; Switz., *Vorentwurf*, 266, 226; Idaho, R. S., 1887, §§ 2495, 2497; La., C. C., 2402; Texas, if real property it becomes separate in character, but the husband has the administration of the same. R. S., 1895, art. 2967; *cf. post*, § 42, note 1.

Germany, B. G., §§ 1526, 1369; Switz., Vorentwurf, 215, 216.

¹⁶ Ariz., R. S., 1887, § 2100; Cal., C. C., §§ 162, 163; Nev., G. S., 1885, § 499; Wash., G. S., 1891, §§ 1397, 1398.

¹¹ France, C. C., 1407, 1408; Spain, C. C., 1396, 1402; Germany, B. G., §1524; Switz., Vorentwurf, 206.

¹² Ante, § 16.

¹⁴ B. G., §§ 1526, 1555.

each party is preserved in a part of his property which regularly becomes dotal by operation of the statute, whereas under general community the entire property, as a rule, becomes common. As the husband has the administration of the dotal property, a special separate estate was not considered necessary in his case. It also appears that in Italy, separate property cannot be established for either party by contract or otherwise. If the parties elect to live under the community system, all of their acquisitions, which do not become communal, will be treated as dotal property.¹⁴

Under the community of acquisitions uncertainty will frequently arise as to whether the title to certain property is common or individual. In order to protect the interests of innocent third parties and to simplify the property relations between the married parties, a presumption is raised, analogous to that which obtains in favor of creditors, respecting the ownership of movables found in the possession of the married parties. It will be presumed that the existing property belongs to both parties jointly. This presumption may be rebutted by the production of public titles, inventories, etc. 16

§ 18. Products of the Personal Industry of the Wife.

Determined efforts have been made in many states still further to restrict the community by excluding therefrom the products of the personal industry of the wife so far as such activity does not pertain to the household or the business of the husband. The movement has received the support of those who advocate the emancipation of the married woman from the disabilities imposed upon her by the

¹⁴ C. C., 1434-1436.

¹⁵ Ante, § 5, notes 15, 16.

¹⁶ France, C. C., 1499: Italy, C. C., 1437; Germany, B. G., §§ 1527, 1528; Prussia, A. L. R., ii, 1, §§ 397, 401.

law. They insist that such property shall become the separate property of the married woman, and that she shall be permitted to exercise such powers over the same as the married man exercises over the products of his industry.

On the other hand, many who oppose the principle of separation of property interests of married parties, have supported the demand for a reform in the law governing acquisitions which proceed from the personal labor of the wife. One of the greatest hardships connected with the system of community, as well as with the English common law, is the fact that property which is the result of the arduous labor of the woman, and probably the sole dependence of the family, may be taken and dissipated by an idle, drunken and vicious husband. The only recourse of the wife is a judicial proceeding for separation of property or divorce. If she has a natural hesitancy to expose her domestic affairs by taking public legal proceedings, or, as is often the case where the evil is greatest, if the expense of the process proves an obstacle, her economic interests are wholly at the mercy of the husband. Even where the extreme cases do not exist, economic principles justify the reform. The energy and economy of the woman will be increased to the extent that she is accorded a control over the results of her activity.

The systems of individual property have generally accorded the married woman adequate protection in this respect.¹ Among the community systems the movement has been successful to a certain extent in the Scandinavian countries, Geneva and the American states, but in the French and Spanish civil codes, as well as in the legislations which recognize community as a contractual system, the old principles have not, as yet, been modified.²

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¹ Post, §§ 26, 32, 39.

² France, C. C., 1401, 1498; Italy, C. C., 1436; Spain, C. C., 1401; Germany,

The proposition to secure the reform by making the products of the industry of the wife her separate property, encountered severe opposition on the ground that such a system would not correspond to the social customs and conceptions which are at the basis of the marriage and the family.³ Moreover, it was argued that it would be inequitable to permit the wife to retain exclusive ownership of the proceeds of her industry while all of the husband's acquisitions were brought into the common mass in which the wife takes an equal share. The interests of creditors have also been advanced as an objection to the proposed plan.

As a result of these considerations the Scandinavian countries do not exclude the wife's earnings from the joint ownership, but give her an exclusive right of disposing of the same, and exempt such property, during the life of the wife, from execution for the husband's debts unless they have been contracted with her consent. If the industry of the wife is carried on for the most part with the capital of the husband, these provisions will not apply.

B. G., § 1524; Prussia, A. L. R., ii, 1, §§ 363, 396; Saxony, B. G., § 1695; Austria, B. G., § 1177.

⁵ Pascaud, "Le Droit de Femme mariée aux Produits de son Travail," Rev. Pol. et Parle., vol. ix, p. 571 seq.; Guntzberger, p. 225 seq.

⁴Denmark, Stat. May 7, 1880, art. 1, An. ttran., vol. 10, p. 533; Norway, Stat. June 29, 1888, art. 31; Finland, Stat. Apl. 15, 1889, c. ii, art. 3. In Sweden a statute of Dec. 11, 1874, amending the law governing matrimonial relations, provides that a married woman may stipulate in the marriage contract that she shall have the free administration of her individual property and of the things that she acquires by her labor, F = S., 1874, no. 109, pp. 1-3; cf. An. ttran., vol. 4, pp. 566, 567.

⁶ Contra in Finland, where such property may be taken after the other common property and the individual property of the husband has been exhausted. Stat. Apl. 15, 1889, c. iv, art. 2.

⁶ Norway, Stat. June 29, 1888, art. 31; in Denmark the same is true if the capital belongs to the community. Stat. May 7, 1880, art. 1, An. étran., vol. 10, p. 533.

A recent statute of Geneva takes a more advanced position. It accords the wife under all systems the same right over the proceeds of her personal industry as is possessed by the married woman under the system of separate property. A qualification has been made, however, under the influence of the considerations indicated above. All of such property must be added to the common mass at the dissolution of the community, unless the wife or her heirs renounce her share in the joint property. She will not be permitted to share in the results of her husband's activity unless she is willing to contribute her earnings to the common partnership.

Attempts are being made to bring about similar reforms in other European states. The Belgian Chamber, in 1899, considered a measure granting married women the right to make small deposits in savings banks and to dispose of the same for household necessities. Such deposits were to be exempt from execution by the creditors of the husband. Similar statutes have been enacted in France, but so far as the system of community obtains between the parties, the sums deposited continue to be held in common and the wife has simply a right of limited administration over the same. 10

In France, also, the movement to accord the married woman similar rights over her earnings, independent of their deposit in a bank, has achieved some success, and it appears

⁷ Stat. Nov. 7, 1894, art. 1, An. Etran, vol. 24, p. 634.

¹ Ibid., art. 4.

⁹ German newspapers of September 13, 1899.

¹⁸ Stat. Apl. 9, 1881, art. 6, Bull. des lois, xii, Sér., vol. 22, p. 666; Stat. July 20, 1886, art. 13, ibid., vol. 33, p. 279. The statute of July 20, 1886, provides for the purchase of an annuity by a certain number of deposits. If the deposits are made by a married party, the annuity will be held as individual property, but an equal amount will be purchased for each spouse. Cf. recent acts of Louisiana, ante, § 3, note 18.

that its purpose is on the point of being accomplished. Two distinct reforms are proposed. One is directed to the evil which exists where the husband's conduct jeopards the interests of the wife and the expense of the proceeding precludes the relief afforded by the judicial separation of property. It is proposed that where the husband by his misconduct injuriously affects the welfare of the household, his wife, without demanding separation of goods, may be authorized by a justice of the peace to collect the products of her labor and to freely dispose of the same. if abandoned by her husband, she may demand a certain portion of his income. Under the other proposition married women, in general, are given the right of free disposition over the products of their personal industry, but such acquisitions continue to belong to the common mass, and, as such, are subject to the claims of the creditors of the hus-These measures were considered by the Chamber of Deputies, and, in 1895, referred to a committee which harmonized and combined the same. Following the latter proposition, the wife, without any special authorization, is entitled to dispose of the products of her labor. Incorporated with this is the provision that a wife deserted by her husband may be authorized to collect a share of his income. Upon the favorable report of the committee the bill passed the Chamber of Deputies in 1896, but it has not as yet received the approval of the Senate.12

The American states which recognize a community of acquisitions, regard the earnings of the wife as common property, but generally give her a right of disposition over the same which is as extensive as that obtained under the

¹¹ An. fran., vol. 14, p. 16, notes 5, 6; Guntzberger, pp. 205, 206, 218.

¹² An. fran., vols. 15, p. 11, note 8, 16, p. 9, note 6; Pascaud, "Le Droit de la Femme mariée aux Produits de son Travail," Rev. Pol. et Parle., vol. ix, p. 579.

Geneva statute.¹³ Moreover, if the wife is living separate from her husband, her earnings become her separate property.¹⁴

Finally, it is worthy of note that the draft code of Switzer-land proposes to go further than any of the existing legislations, except those recognizing separate property as the statutory system, by providing that under all systems of matrimonial property the acquisitions proceeding from the labor of the wife shall be her separate property.¹⁶

§ 19. Obligations of the Community.

(a) General Community.

· According to the ideal principle at the basis of the system of general community, the obligations of each of the parties, whether incurred before or during the existence of the community, should become common. This theory, however, fails of realization to an even greater degree than is true with respect to the composition of the community. Considerations of equity have led to a modification of the general principle.

The legislations recognize in general, that the common property is liable for the obligations of each of the married parties. This liability, however, does not extend to

¹³ There is a general exemption of such property from liability for the husband's debts. Cal., C. C., § 168; Nev., G. S., 1885, § 511; N. M., C. L., 1897, § 1509; Wash., G. S., 1891, § 1402; cf. recent acts of Louisiana, ante, § 3, note 18.

¹⁴ Ariz., R. S., 1887, § 2101; Cal., C. C., § 169; Idaho, R. S., 1887, § 2502; Nev., G. S., 1885, § 512; Wash., G. S., 1891, § 1403.

15 Switz., Vorentwurf, 217.

¹ France, C. C., 1409; Austria, B. G., § 1235; Norway, Stat. June 29, 1888, arts. 17, 23; Germany, B. G., § 1459; Saxony, B. G., § 1696; Prussia, A. L. R., ii, 1, §§ 391, 394, but if the ante-nuptial debts of one party exceed his contribution to the common fund, the other may move for separation of property within two years after marriage, in which case only the individual property of the debtor can be held for such debts. *Ibid.*, §§ 392, 393.

obligations arising from post-nuptial contracts entered into by the wife without the authorization of her husband, except where she has an independent right of administration over the common property.² The same is true of obligations arising in connection with property which is excluded from the joint ownership and subjected to the administration of the wife.³ Aside from these exceptions, the obligations of each of the parties, whether arising out of contract or tort, and including the expenses of judicial proceedings, bind the community.⁴ This is true, however, only as regards third parties.

There is another departure from the principle of ideal community in the recognition of certain obligations, which, as between the parties themselves, do not bind the common property, but fall to the charge of the individual debtor. These include obligations arising from the criminal acts of either party,⁵ and those incurred in connection with the administration of the separate property of either party.⁶

It must also be noted that even as regards third parties, the obligations that bind the common property are not true communal obligations. As such, they would bind not only

⁹ France, C. C., 1409, 1419; Germany, B. G., § 1460; Prussia, A. L, R., ii, 1, § 389; Norway, Stat. June 29, 1888, art. 17; Switz., *Vorentwurf*, 249, 250.

³ Germany, B. G., §§ 1461, 1462; Prussia, A. L. R., ii, 1, § 389; Norway, Stat. June 29, 1888, art. 17.

⁴ In France the common property is not liable for fines imposed as a result of criminal acts of the wife, C. C., 1424.

⁵ France, C. C., 1424; Germany, B. G., § 1463; Prussia, A. L. R., ii, 1, §§ 385, 390; Norway, extends to any obligation resulting from the wrongful act of either party, Stat. June 29, 1888, arts. 17, 18.

⁶ France, C. C., 1409, 1412, 1437; Germany, B. G., § 1463; Prussia, A. L. R., ii, 1, §§ 385, 390; Norway, Stat. June 29, 1888, arts. 17, 18. For other particular provisions respecting compensation due from one party to the other for obligations satisfied out of the common property, see France, C. C., §§ 1438, 1439; Germany, B. G., §§ 1464–1467; Norway, Stat. June 29, 1888, art. 23; Switz., Vorentwurf, 252.

the common property but each party individually. The legislations agree, however, in exempting the wife from any personal liability for such obligations, except where they fall to her charge as between the parties themselves.⁷ On the other hand, this privilege is not extended to the husband, who is generally personally responsible for all obligations that bind the common property.⁸

The explanation of these departures from the strict principle of community is to be found partially in the exceptions arising respecting the composition of general community, but chiefly in the extensive exclusive rights of administration which are enjoyed by the husband. This power might seriously endanger the interests of the wife if she were to be held liable for the obligations which bind the common property.

(b) Community of Movables and Acquisitions.

The obligations of the common association under the system of community of movables and acquisitions are determined by the same general rules as regulate the obligations of the general community." As between the parties, also, the same principles are at the basis of the compensation and contribution due for the individual debts which are discharged out of the common funds."

Denkschrift, p. 295; see, also, post, § 24.

⁶ France, only for a moiety of those which are personal to his wife, C. C., 1485; Germany, for obligations personal to his wife such liability expires at the dissolution of the community, B. G., § 1459; Switz., Vorentwurf, 251.

⁹ Ante, § 16.

¹⁶ Post, § 20.

¹¹ Germany, B. G., § 1549; Finland, Stat. Apl. 15, 1889, c. iv, arts. 2, 4; see notes, ante, (a).

¹³ But in Finland, ante-nuptial obligations are separate as between the parties, and the Norwegian statute is followed in applying the same rule to obligations arising from wrongful acts, Stat. Apl. 15, 1889, c. iv, arts. 1, 5; cf. Norway, Stat. June 29, 1888, arts. 23, 17, 18.

Finland has departed from the general rule respecting personal liability for the debts which are binding upon the common property. It exempts the husband as well as the wife from liability for those debts of the other party, which, as between the parties, do not fall to the charge of the community.¹³ Where the parties have obliged themselves equally, or where the wife, with the authorization of the husband, has contracted obligations in the interest of the household, both parties are bound; and if the individual property of one fails to liquidate his share, the deficiency will be satisfied out of the property of the other.¹⁴ In other respects the general rule is followed.¹⁸

(c) Community of Acquisitions.

The system of community of acquisitions does not contemplate any general blending of the property interests of the married parties. The community does not embrace the capital stock of either party, and hence the principle that all obligations of the parties should bind the common property does not obtain. The common property is constituted for the primary purpose of sustaining the matrimonial charges, and is liable for the same whether they are incurred by the husband or by the wife, if within the sphere of her administration. As all of the profits of dotal property fall into the common mass, the latter must sustain the necessary charges binding upon such property or connected with its administration or preservation. ¹⁶

With respect to other obligations, the principle would seem to require that they shall have been created for the benefit of the common property or connected with its ad-

¹⁸ Stat. Apl. 15, 1889, c. iv, arts. 1, 5, 6.

¹⁴ *Ibid.*, art. 2. 15 *Ibid.*, art. 3.

¹⁶ France, C. C., 1498, 1409; Spain, C. C., 1408; Italy, C. C., 1434, 1435; Germany, B. G., § 1531; Prussia, A. L, R., ii, 1, §§ 407, 408; Saxony, B. G., § 1696; Switz., *Vorentwurf*, 266, 248, 250; Texas, R. S., 1895, arts. 1201, 2970.

ministration, in order to be binding upon the community. The states are not in accord upon this question. French Civil Code and the legislations that have felt its influence, recognize the logical development of the principle and exclude the ante-nuptial obligations of each of the parties." A practical difficulty in the way of the realization of this principle is the fact that the husband is the general administrator of the common property and can freely dispose of the same. He is thereby enabled to use the common fund in the liquidation of his ante-nuptial obligations. It is probable that most of the legislations would recognize the right of the husband's ante-nuptial creditors to seize the common property, at least after all of the common creditors had been satisfied, but would require the husband to make compensation at the dissolution of the community. This is particularly true among the German states, where the tendency is to regard the husband, who is the head of the community, as occupying much the same position as under the system of marital administration and usufruct. Accordingly, the new German code makes the acquisitions which constitute the common property, responsible for the antenuptial debts of the husband, while excluding liability for such obligations of the wife.18

So far as concerns post-nuptial obligations, the rule obtains as under other systems of community that the common

¹⁷ France, C. C., 1498; Italy, C. C., 1435; Spain, if all communal obligations have been satisfied, the common property may be held for the ante-nuptial debts of either party, if the debtor has not sufficient individual property, C. C., 1410; La., C. C., 2403; cf. Austria, B. G., § 1235; Texas, R. S., 1895, arts. 2973, 2219; Wash., G. S. 1891, § 1413.

¹⁸ B. G., § 1530; in Prussia (A. L. R., ii, I, §§ 407, 408), and the Swiss draft code (*Vorentwurf*, 266, 248), the rule is the same as under general community that the ante-nuptial obligations of each party bind the community. *Cf.* Ariz., R. S., 1887, § 2105; Cal., C. C., § 170; Idaho, R. S., 1887, § 2503; Nev., G. S., 1885, § 514.

property is liable for the debts and obligations contracted by the husband during the existence of the community. The case is different, however, as regards post-nuptial obligations incurred by the wife. The community of acquisitions is not regularly liable for such obligations. It is only in those cases where the wife has undertaken the same with the express or implied authorization of her husband or has an independent right of communal administration that her acts will be binding upon the common property. Accordingly, obligations arising from her torts or unlawful acts do not bind the common fund.

Claims for compensation by one party against the other on account of personal obligations which have been discharged out of the common property, are determined in the same manner as under other systems of community. Inasmuch, however, as the ante-nuptial obligations of the wife are not supported by the joint property, the husband is required to make compensation where his obligations, arising before the beginning of the community, have been liquidated out of the common fund."

The personal liability for the common obligations is likewise regulated by the same rules as obtain for general community.²⁴ The exemptions of the wife and the extensive

¹⁹ France, C. C., 1498, 1409; Italy, C. C., 1434, 1438; Spain, C. C., 1408; Germany, B. G., § 1530; Prussia, A. L. R., ii, i, § 407; Switz., *Vorentwurf*, 249.

¹⁰ France, C. C., 1498; Spain, C. C., 1408; Italy, C. C., 1436; Germany, B. G., §§ 1532–1534; Prussia, A. L. R., ii, I, § 408; Switz., *Vorentwurf*, 250; Ariz., R. S., 1887, § 2107; Cal., C. C., § 167; Idaho, R. S., 1887, § 5860; La., C. C., 2403, 1786; Nev., G. S., 1885, § 538; Texas, R. S., 1895, arts, 2973, 2219, 2970, 2971.

³¹ In Spain, this is true of both parties, but if the common debts have been satisfied, the payment of such obligations may be demanded out of the common property if the debtor has insufficient individual property, C. C., 1410.

21 Germany, B. G., § 1536; Spain, C. C., 1410.

27 Ante (a). In Prussia, however, the husband as well as the wife does not neur any liability for the individual debts of the other, A. L. R., ii. I, § 406; cf.

liabilities of the husband correspond to their respective fields of administration, and will be better appreciated after the consideration of such functions.

§ 20. Administration of the Common Property.

In order to carry out the ideal principle of community, the administration of the property should be entrusted to the married parties jointly. The management and disposition should represent the united action of the two parties. While this principle of the "gesammte Hand" has not failed to find advocates, the legislations have modified it in the same degree as they have abandoned other embodiments of the broad communal idea. Thus, it is generally recognized that the husband has the administration of the common property and exercises the right in his own name. This power of administration does not, however, confer an unqualified power of disposition over the common goods. Considerations of the interests of the wife have led to limitations upon certain acts. The principle of common administration is also retained in provisions that the co-operation of the wife

Ariz., R. S. 1887, § 2105; Cal., C. C., §§ 170, 171; Idaho, R. S., 1887, §§ 2503, 2504; Nev., G. S., 1885, §§ 514, 515; Wash., G. S., 1891, § 1413.

¹ Professor Gierke, in his criticism of the first draft of the German Code, argues that if any single statutory system is to be created it should be general community, and insists upon its establishment in accordance with the ideal principle of community (Gierke, Entwurf, pp. 417, 425 seq.); cf. Proelsz und Raschke, Die Frau im neuen bürgerlichen Gesetsbuch, p. 14. In the first drafts of the Code Napoléon the system of common administration was introduced, but this was later abandoned for the exclusive administration of the husband, Guntzberger, pp. 39, 40; cf. provisions of Swiss draft code, post, note 6.

² France, C. C., 1421; Italy, C. C., 1438; Spain, C. C., 1412; Germany, B. G., § 1443, 1519, 1549; Prussia, A. L. R., ii, 1, § 377, 411; Saxony, B. G., § 1697; Norway, Stat. June 29, 1888, art. 14; Finland, Stat. Apl. 15, 1889, c. ii, art. 1; Basle, Stat. Mch. 10, 1884, art. 2; Switz., Vorentwurf, 245, 266; Ariz., R. S., 1887, § 2102; Cal., C. C., § 172; Idaho, R. S., 1887, § 2505; La., C. C., 2404; Nev., G. S., 1885, § 504; Texas, R. S., 1895, Art. 2968; Wash., G. S., §§ 1399, 1400.



shall be necessary to the validity of particular dispositions. Finally, an independent sphere of administration of the common property is given the married woman.

The limitations upon the power of the husband rest upon considerations of the nature of the act or the character of the property to be affected thereby. His donations out of the common property, except where made in sulfilment of a customary duty, are dependent upon the consent of the wise or are sorbidden in general terms. Under some legislations, acts whereby the husband undertakes to dispose of the whole or a general part of the common property, are likewise conditioned. The attitude of legislations towards real property has generally led to similar requirements for the consent of the wise, or the joint action of the parties where common immovables are to be encumbered or alienated.

*Italy, C. C., 1438; Spain, C. C., 1413-1415; Germany, B. G., § 1446; Norway, where they exceed one-tenth in value of the common goods, Stat. June 29, 1888, art. 14; Switz., Vorentwurf, 246; in Prussia the husband has the general right to make donations, but the wife may contest the same where she would have such right if donation proceeded from her, and is entitled to compensation at the end of the community, A. L. R., ii, 1, §§ 380-383; in France (C. C., 1422), and Louisiana (C. C., 2404), the prohibition does not extend to particular donations of movables except the husband has retained the usufruct of the same. While most of the American States have not limited the husband's power in this matter, except as regards testamentary dispositions, a California statute of March 31, 1891, makes all donations of common property dependent upon written consent of wife, Stat. and Amend., 1891, p. 425.

Germany, B. G., § 1444; Prussia, A. L. R., ii, 1, §§ 378, 379; Saxony, B. G., § 1698; Switz., Vorentwurf, 246. The legislations that have followed the Code Napoléon do not distinguish between acts of general and of particular disposition except as regards gifts (see preceding note), and in some cases dispositions affecting immovables. It is necessary to note that the general community does not obtain as the statutory system in these legislations, and is absolutely prohibited in some (ante, § 13, note 18).

⁵ Germany, B. G., § 1445; Prussia, A. L. R., ii, 1, §§ 378, 379; Saxony, B. G., § 1698; Norway, if brought by wife into community, Stat. June 29, 1888, art. 14; Finland, Stat. Apl. 15, 1889, c. ii, art. 2; Basle, Stat. Mch. 10, 1884, art. 4; Wash.,

The draft code of Switzerland preserves the principle of joint action to a greater degree than the existing legislations. It provides that all dispositions of either party, affecting the common property, which exceed acts of ordinary administration, are subject to the consent or joinder of the other. Such consent, however, will be presumed except where the third party has knowledge to the contrary, or where it is clear that the property belongs to both parties jointly.

In order to avoid the damage to the common economic interests which may result from disagreement between the parties, it is generally provided that if the wife refuses her consent, or for other reasons it cannot be obtained, the court may supply the same if the conditions of the administration justify the act.⁷

The married woman is generally given a limited right of administration of the common property. This is for the most part restricted to acts performed within the circle of her domestic activity, or in an independent business which she carries on with the consent of her husband. It has been increased to the extent that she has been given a con-

G. S., 1891, § 1400. The other legislations do not limit the husband's power in this respect (cf. preceding note), but, in American states, if the common real estate is occupied as a homestead, acts of disposition of the same will be subject to the joinder of the wife. See post, § 41.

⁶ Switz., Vorentwurf, 346; cf. Prussia, A. L. R., ii, 1, § 387.

⁷Germany, B. G., § 1447; Prussia, A. L. R., ii, 1, §§ 387, 388; Basle, Stat. Mch. 10, 1884, art. 4; Switz., *Vorentwurf*, 247, 199; cf, Finland, Stat. Apl. 15, 1889, c. ii, art. 2.

[•] But in Norway any obligation contracted by the wife for the benefit of the community binds the common property, Stat. June 29, 1888, art. 17.

^{*} Ante, \$ 8.

¹⁰ Ante, § 6; France, C. C., 220; Italy, C. C., 135; Germany, B. G., §§ 1452, 1405; Prussia, A. L. R., ii, 1, §§ 389, 335-337; Basle, Stat. Mch. 10, 1884, art. 8; La., C. C., 131.

trol over the products of her personal industry." With respect to other acts affecting the common property, the wife must, in general, obtain the authorization of her husband." Where the circumstances do not justify a refusal of authorization by the husband, his consent may be supplied by the court." The French code, while recognizing the right of the court to supply the consent of the husband so as to validate an act of the wife, does not permit her to bind the common property by such act. Unless the husband consents to the same it will bind only the individual property of the wife. 16

The position of the wife, as a partner in the community, is recognized by granting her the right of temporary administration, in case of the absence or disability of the husband, where damage might result if the matter were delayed. In systems following the Code Napoléon, however, the wife, even in such cases, must receive the authorization of the court in order to bind the common property.

It is the general rule that if the husband is under guardianship, he will be represented by his guardian in the administration of the common property.¹⁸ The tendency,

¹¹ Ante, § 18; in the Swiss draft code, such products, as well as the goods employed in her trade or industry, are the separate property of the wife and are hence entirely excluded from common administration, *Vorentwurf*, 217.

¹³ The German code gives the wife the sole right of accepting or rejecting donations, successions, etc., B. G., § 1453; cf. also, ibid., §§ 1449, 1454. Cf. acts in France and Louisiana giving wife right of administration over her deposits in savings banks, ante, § 3, notes 7, 18.

¹⁸ Germany, B. G., § 1451; Saxony, B. G., § 1644; Cf. Switz., Vorentwurf, 247; ante, § 3.

16 C. C., 218, 219. 13 Ibid., 1426; cf. Spain, C. C., 1416.

¹⁶ Germany, B. G., § 1450; Prussia, A. L. R., ii, 1, §§ 202-204, 327, 389; Saxony, B. G., § 1643; cf. Norway, Stat. June 29, 1888, art. 17.

17 France, C. C., 124, 1427, C. C. P., 863; Spain, C. C., 188; La., C. C., 132.

¹⁸ Germany, B. G., § 1457; Motive, vol. iv, p. 364; but see contra, Saxony, B. G., § 1700; Spain, C. C., 225, where the right of administration is accorded the wife.



however, is to give the wife the right and privilege of being appointed guardian of her husband.19

Practical considerations have led to the substitution of the individual for the common principle in the administration of the joint property. The husband is the head of the family and, as such, is the natural administrator of its economic interests. The property of the wife is safeguarded by requiring her consent to certain acts, by constituting securities in her favor, and by enabling her to take measures for withdrawing the administration from the husband whenever his acts imperil her interests. The fact, moreover, that the wife incurs no personal responsibility for such acts of administration is at once a cause and a result of the extensive powers accorded to the husband.

§ 21. Administration of the Dotal and Separate Property.

The dotal property of the married parties is administered by the husband for their joint benefit and profit. The rules determining the scope and extent of his powers are for the most part the same as those which regulate the administration of dotal property under the system of marital administration and usufruct, and will be considered in connection with the discussion of that system.¹

Separate property, under communal systems, is governed by the general regulations obtaining for the system of separate property.²

¹⁹ Mative, vol. iv, p. 364; Spain, C. C., 220, 230; La., Acts, 1894, No. 45; contra, France, C. C., 442.

²⁰ Post, § 22. 21 Post, § 23, (b).

²² Ante, § 19, (a), note, 7.

¹ Post, § 27. The code of Germany and the draft code of Switzerland provide that dotal property, under communal systems, shall be administered according to the rules regulating the system of marital administration and usufruct. Germany, B. G., §§ 1439, 1525, 1550; Switz., Vorentwurf, 266.

² Ante, § 15; Germany, B. G., §§ 1444, 1526, 1549; Switz., Vorentwurf, 264, 215.

§ 22. Protection of the Wife's Property.

Under the general community, the property of the wife is united with that of the husband to form a common mass. If joint administration exists, no particular provisions are necessary for the protection of the wife's interests. But where the husband is recognized as having an individual right of administration, the rights of the wife may be seriously endangered. Most of the legislations recognize this fact, and in according the husband extensive powers of disposition, they have generally furnished the wife with certain means for the protection of her property. Particular qualifications upon the husband's power of disposing of the common property have been indicated, and it has also been shown that the wife is entirely relieved from any personal liability for the administration of her husband.

The efficiency of the common administration would be seriously impaired if the wife could hold the husband accountable for the character of his administration. The communal idea is therefore retained in this respect. It is sometimes recognized, however, that if the husband damages the common property with the design of injuring the interests of the wife, he may be compelled to make compensation.⁵

The wife has not, in general, any right to a particular security on account of her share in the common property.

³Germany, B. G., § 1456; cf. Prussia, A. L. R., ii, 1, §383; Norway, Stat. June 29, 1888, art. 16.

⁴ In Basle City, the wife in case her husband becomes bankrupt, has a claim against the mass for the whole of the fortune she has contributed to the common property, and is carried as a privileged creditor for the moiety of such amount. Stat. Mch. 10, 1884, art. 11. Prior to this statute she had a privilege for the whole amount. An. ètran., vol. 14, p. 545. The federal law of bankruptcy provides that the privileged share cannot exceed one-half. Alexander, Konk. G., p. 307. The draft Swiss code gives the wife the right to demand security for the prop-

It appears reasonable that, in so far as she possesses dotal property, it should be protected in the same degree as under other systems of matrimonial property. This is the position taken by the new German code. The title of dotal and separate property may be protected against the presumption that existing goods belong to the husband, or are common in character, by means of a properly authenticated inventory.

The code of Saxony gave the wife efficient protection in her right to demand that the administration of the common property be given to her whenever her rights are endangered through the bad administration of her husband, and the same is true in Spain when the husband is declared a spendthrift. In most of the legislations, however, the married woman is limited for the protection of her interests in the common property to her right to move for a dissolution of the community."

§ 23. Dissolution of the Community.1

(a) As the Legal Result of Bankruptcy.

Some of the legislations recognize that the community is erty she contributes, but such claim will justify the husband in demanding a dissolution of the community. *Vorentwurf*, 213, 199.

Post, §§ 29, 30, 34.

⁶B. G., §§ 1439, 1525, 1550, 1391.

¹ Ante, § 5.

⁸ France, C. C., 1499, 1504, 1510; Italy, C. C., 1437; Spain, C. C., 1407; Germany, B. G., § 1528; Prussia, A. L. R., ii, 1, §§ 374-376, 397-401; Norway, Stat. June 29, 1888, art. 6; Finland, Stat. Mch. 10, 1889, c. iii, art. 4; Ariz., R. S., 1887, §§ 2611-2616; Cal., C. C., §§ 165-166; Idaho, R. S., 1887, §§ 2500, 2501; La., C. C., 2405; Nev., G. S., 1885, §§ 501-503; Texas, R. S., 1895, arts. 4654-4659.

¹⁰ B. G., § 1700.

¹¹ Post, § 23, (b).

¹The American legislations, with the exception of Louisiana, do not recognize a dissolution of the community except as a result of a dissolution of the marriage, but a partial separation of property results whenever the wife is living separate from her husband. See ante, § 18, note 14.

dissolved by operation of law, as a result of the opening of bankruptcy proceedings over the property of either party. This rule has been accepted, for the most part, only in those states where the bulk of the wife's property is dotal. In general community or community of movables and acquisitions the common property constitutes the major portion, and a rule by which the dissolution of the community followed as the necessary legal result of the bankruptcy of either party, would involve a serious breach in the nature of the matrimonial property relations.

(b) Upon Demand of One of the Parties.

While most of the legislations do not accept the principle that bankruptcy dissolves the community of property, there is general agreement in recognizing the right to move for a dissolution in cases of bankruptcy or insolvency, or whenever the irregular administration or excessive obligations of one party are such as to endanger the rights of the other in the common property.³

An important ground for demanding the dissolution of the community, which has been introduced in recent legislation, is the failure of the husband to fulfil his obligation to furnish support for his wife and children.⁴

² Austria, B. G., § 1262; Basle, Stat. Mch. 10, 1884, arts. 1, 12; Switzerland, if claims of the creditors are not satisfied, *Vorentwurf*, 197; Germany, limited to the bankruptcy of the husband, and obtains only under community of acquisitions. B. G., § 1543.

⁸ Upon demand of either party: Germany, B. G., §§ 1468, 1469, 1542; Prussia, A. L. R., ii, I, § 421; Finland, Stat. Apl. 15, 1889, c. v.; Switz., *Vorentwurf*, 197, 198; upon demand of the wife: France, C. C., 1443; Italy, C. C., 1442; Norway, Stat. June 29, 1888, art. 38; Basle, Stat. Mch. 10, 1884, art. 40; La., C. C., 2425; for rule in Saxony (B. G., § 1700), and Spain (C. C., 225), see ante, § 22.

⁴ Germany, B. G., §§ 1468, 1542; Geneva, Stat. Nov. 7, 1894, art. 5 (An. Etran., vol. 24, p. 635), extending provisions of art. 1443 of the French Civil Code, which is deficient in this respect; Switz., Vorentwurf, 198; Norway, if husband has abandoned wife, Stat. June 29, 1888, art. 34; cf. ante, § 18, notes 11, 12, proposed statute in France according wife, in case of misconduct of her husband, a partial separation of property so far as regards her earnings.



Among the other grounds recognized as justifying a demand for the dissolution of common property relations are the placing of the husband under guardianship,⁵ his disappearance⁶ or his disposition of matters without the necessary consent of the wife.⁷

(c) By Mutual Agreement.

In general, all systems, except those that prohibit postnuptial marriage contracts, permit the community to be dissolved as a result of agreement between the parties. As regards innocent third parties, particular formalities must be observed, but as between the parties, the dissolution is effective from the conclusion of the agreement.⁸

(d) By Divorce or Judicial Separation of the Parties.

The dissolution of the marriage by decree of divorce or nullity regularly produces a separation of the property interests of the parties.⁹ The same effect generally results from a judicial separation of the parties which does not involve a dissolution of the matrimonial relation.¹⁰ Under some of the systems, however, such separation does not

⁶ Germany, in case of community of acquisitions, B. G., §§ 1542, 1418; in other systems of community, only when he is placed under guardianship as a spend-thrift, *ibid.*, §§ 1468, 1549.

⁶ Italy, C. C., 1441; Spain, C. C., 1433; Germany, in case of community of acquisitions, B. G., §§ 1542, 1418; Norway, Stat. June 29, 1888, art. 34.

⁷ Germany, B. G., §§ 1468, 1542.

⁸ Germany, B. G., § 1432; Saxony, B. G., § 1691; Austria, B. G., §§ 1217, 1263; Norway, Stat. June 29, 1888, art. 34; Switz., *Vorentwurf*, 195; for particular modifications in Prussia (A. L. R., ii, 1, §§ 354 seq., 412 seq.), see ante, § 12, note 7.

<sup>France, C. C., 1441; Spain, C. C., 72; Germany, B. G., § 1564 seq.; Prussia,
A. L. R., ii, 1, § 732; Saxony, B. G., §§ 1706, 1712, 1740; Austria, B. G., § 1266;
Besle, Stat. Mch. 10, 1884, arts. 23, 26; Switz.. Vorentwurf, 173; Finland, Stat.
Apl. 15, 1889, c. v, art. 19; La., C. C., 159.</sup>

³⁰ France, C. C., 1441; Spain, C. C., 73; Italy, C. C., 1441; Germany, B. G., § 1586; Saxony, if for life, B. G., § 1706; La., C. C., 155.

carry with it a dissolution of the community, but only the right to demand the same.¹²

(e) As a Result of the Death of One of the Parties.

The dissolution of the marriage by the death of either party has generally the effect of dissolving the matrimonial property relationships. This rule is subject to an exception in the case of general community, where issue of the marriage exists. In such event the community is continued (fortgestate Gütergemeinschaft; communauté prolongée) between the surviving married party and the common chil-This rule, which had its origin among the Westphalian Saxons, 18 seems to be the logical development of the strict principle of the general community. It has not, however, been generally accepted in modern legislations.¹³ It obtains in localities in Germany and Switzerland, and the new code of Germany as well as the Swiss draft code have recognized the principle. In the former, such community arises by operation of law, but may be renounced by the surviving married party,14 while in the latter the system must be the result of agreement between the survivor and the common children.15

In general, the continued community is subject to the same regulations as the general community of property between the married parties. The survivor possesses the

¹¹ Saxony, if separation is not to continue during life, B, G., § 1706; Austria, the innocent party may resist such demand, B. G., § 1264; Basle, Stat. Mch. 10, 1884, art. 22; Switzerland, if separation is to continue for one year or longer, *Vorentury*, 174.

¹³ Heusler, Inst., vol. ii, §§ 151, 162.

¹⁸ France, C. C., 1441; Prussia, A. L. R., ii, 1, \$\$ 634-636; Saxony, B. G., \$ 1702; Austria, B. G., \$ 1234; Basle, Stat. Mch. 10, 1884, art. 13; a right of usufruct is granted survivor in portions falling by succession to share of common minor children, ibid., art. 19.

¹⁴ Germany, B. G., §§ 1483, 1484.

¹⁵ Switz., Vorentwurf, 256.

rights and obligations of the husband, while the common children occupy the legal position of the wife. The individual property owned by the common children does not fall into the common mass. In Germany, all property acquired by such children is likewise excluded, but the Swiss draft code regards as their separate property only such acquisitions as come to them by gratuitous title. The dissolution of the community may be brought about by the act of the survivor at any time. It results by operation of law in case of the remarriage or death of such survivor, and it may be demanded by the children under the same general conditions which entitle the wife to move for a separation of property.

§ 24. Effects of the Dissolution of the Community.

The dissolution of the community leads regularly to a separation of property between the married parties or their representatives. The liquidation of the community proceeds in accordance with the principles determining rights and obligations under the particular communal system. The common obligations must be satisfied out of the joint property. If the latter does not suffice, the husband is personally bound for all such obligations.¹

The privilege which the wife enjoys of being relieved from responsibility for all common debts, except those which as between husband and wife fall to her charge, is not

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¹⁶ Germany, B. G., § 1487; Switz., Vorentwurf, 257, 258.

¹⁷ Germany, B. G., § 1485; Switz., Vorentwurf, 257.

¹⁶ Germany, B. G., § 1492: Switz., Vorentwurf, 259.

¹⁹Germany, B. G., §§ 1493, 1494; Switz., and also in case of bankruptcy, Vor-entwurf, 260.

^{*}Germany, B. G., § 1495; cf. Switz., Vorentwurf, 259.

¹ For particular exceptions in France and Germany, see ante, § 19, note 8.

² Ante, § 19 (a).

always an absolute exemption. She is generally accorded the right of obtaining such exemption by means of a renunciation or inventory, or both. According to the former, she relieves herself from all liability by renouncing her share in the common property.³ The second method gives the wife or her representatives the benefit of inventory which is generally accorded to the heirs of a succession. She is permitted, in accepting the community, to make an inventory of the same, and in such case will be bound for the debts, as regards creditors, as well as the husband or his representatives, only to the extent of the common property which she receives.⁴

The German code gives the wife an absolute exemption from personal liability for the obligations resulting from the husband's administration of the community, and hence the benefit of renunciation or inventory is unnecessary.⁵ She will be responsible, to the extent of the common property which she receives, for such common debts as remain unsatisfied at the time the separation of property is made.⁶ The husband, however, is subject to a warranty that the wife will not be called upon to liquidate obligations which, as between the parties, fall to his charge or to that of the common property, and the wife is under similar obligation towards her husband respecting debts falling to her charge.⁷

After the liquidation of the common obligations, the prop-

² France, C. C., 1453 seq., 1492 seq.; Italy, C. C., 1444; Switz., Vorenswurf, 254; La., C. C., 2410, 2411.

⁴ France, C. C., 1483; Italy, C. C., 1444; Prussia, privilege of inventory exists for either party, A. L. R., ii, 1, § 661, i, 9, § 418 seq.; Switz., Vorentwurf, 254; La., C. C., 2413, 2414, 2419, 2423.

⁵ B. G., § 1443; cf. Finland, Stat. Apl. 15, 1889, c. iv, arts. 2, 3; Basle, Stat. Mch. 10, 1884, art. 6; references to American statutes, ante, § 19, note 23.

⁶ B. G., § 1480.

¹ Ibid., § 1481; cf. Norway, Stat. June 29, 1888, art. 37.

erty is divided between the parties or their representatives.⁸ Such amounts as have been paid out of the common mass to satisfy debts which are personal to either party are counted in the share of such party, and he is entitled to credit for such sums as have been paid out of his individual goods for the benefit of the common property.

Inasmuch as the common mass may contain articles of peculiar personal value to one of the parties, it is generally provided that such objects may be selected by the party before division, the value of the same being deducted from his share.9

If the conjugal association is not dissolved or suspended, the matrimonial property relations for the future will be regulated by the system of separate property. On the other hand, where the community ceases as a result of the dissolution of the marriage, there is no further question of matrimonial property rights, and the parties or their representatives take their shares as strangers, subject to such particular qualifications as may be connected with the circumstances of the dissolution. Thus, special provisions exist for the case where the marriage is dissolved by decree of divorce. Privileges are generally accorded the innocent party over and above the right to receive support from the guilty party."

⁸ France, C. C., 1474; Spain, C. C., 1424, 1426; Germany, B. G., §§ 1476, 1546, 1549; Prussia, A. L. R., ii, 1, §§ 637, 638; Saxony, B. G., § 1702; Austria, B. G., § 1234; Finland, Stat. Apl. 15, 1889, c. i. art. 2 seq.; Switz., Vorentwurf, 253; La., C. C., 2406; for particular rule in some of the Swiss cantons, see post, notes, 13, 15, 16.

⁹Germany, B. G., § 1477; Prussia, without deduction from share in community, A. L. R., ii, I, § 640, 641; Switz., *Vorentwurf*, 255.

¹⁶ Germany, B. G., §1470; Prussia, A. L. R., ii, 1, §§ 392, 410; France, C. C., 1443 seq.; Switz., Vorentwurf, 197 seq.

¹¹ Germany, the right to demand that each shall receive the value of all the property that he brought into the common mass, any deficiency to be equally sustained

When the conjugal relation is dissolved by the death of one of the parties, the survivor takes one share of the common property and the succession of the deceased receives the other.19 In some cases, however, rights of succession come in combination with pure matrimonial rights and affect the equality of the shares. Thus, in the canton of Basle City, the survivor takes two-thirds and the heirs of the decedent receive one-third of the common property.13 The excess taken by the survivor is in the nature of a legal portion in the succession of the decedent.¹⁴ Under the law existing before the enactment of the statute of 1884, the husband received two-thirds and the wife one-third.¹⁵ This rule still obtains in some of the Swiss cantons. 16 In some of the American states, the surviving husband is entitled to the entire common property, while the surviving wife takes only a moiety.¹⁷ The greater number of legislations, however, support the principle of division into equal parts, leaving the survivor to his general rights of succession in the estate of the decedent.18

by each party, B. G., § 1478; Prussia, A. L. R., ii, 1, §§ 755 seq., 812 seq.; Basle, Stat. Mch. 10, 1884, art. 23 seq.; Switz., Vorentwurf, 170; for rule in American community systems, cf. references, post, § 43, notes 13, 14.

¹² France, C. C., 1474; Germany, B. G., § 1482; Prussia, A. L. R., ii, 1, §§ 637, 638; Saxony, B. G., §1702; Austria, B. G., § 1234; Switz., *Vorentwerf*, 253.

¹³ Stat. Mch. 10, 1884, art. 13.

¹⁴ Post, § 47.

¹⁵ Lardy, Ligislations Suisses, p. 51.

¹⁶ See ibid., chart in appendix, showing attitude of cantons respecting this matter.

¹⁷ Cal., C. C., §§ 1401, 1402; Idaho, R. S., 1887, §§ 5712, 5713; Nev., G. S., 1885, §§ 508, 509; for other particular regulations concerning succession to common property, see Prussia, A. L. R., ii, I, § 638 seq.; Ariz., R. S., 1887, §§ 1100, 1467; Cal., C. C., § 1265; Idaho, R. S., 1887, §§ 3073, 5447; Texas, R. S., 1895, art. 1696; Wash., G. S., 1861, § 1481.

¹⁸ Post, § 45 seq.

CHAPTER IV.

SYSTEMS OF INDIVIDUAL PROPERTY.

DIVISION I.

EXCLUSIVE RIGHTS OF THE HUSBAND.

§ 25. In Roman and in Teutonic Law.

The family relations in early Roman and in early Teutonic law were characterized by the element of paternal headship and authority. This was true as well of the relation between husband and wife as of that between parent and child. The Roman law was primarily influenced by the conception of the power and right of the man, while the Teutonic law emphasized the idea of guardianship in the position of the husband and father. In the Roman manus marriage, the wife, in the eyes of the law, occupied the position of a slave. This form of marriage may be regarded as a legal method of transferring ownership in the person and property of the The woman occupied essentially the same legal rewoman. lation toward her husband that she had formerly held with respect to her father or pater familias. The latter was master of the persons and goods of his household, so that there could arise no questions of personal or property rights between him and the members of his family. As regards third parties, the relations would be determined as in the case of master and slave. The property which the woman held or which was constituted for her benefit, passed into the possession or ownership of her husband. He became liable on her contracts in the same degree as if the obligations had

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been contracted by his child or slave, and the same was true of his responsibility for her tortious acts. In this system there were no proper matrimonial relations. The husband's rights were paternal rather than marital, and, so far as the law was concerned, paternal rights were as unlimited as those of a dominus.

This rigorous system received modifications at an early period. The extreme legal powers of the husband, which resulted from his manus, were not necessarily embodied in actual conditions. With the development of the free marriage, where manus mariti was excluded, the property as well as the personal rights of the wife came to be recognized. The woman in contracting marriage did not lose her position in her agnatic family, and hence did not suffer a diminution in her status. The exclusive property rights of the husband disappeared with the loss of his absolute powers over the person of his wife. The marriage, as such, did not affect the property of the woman. This did not exclude property relations between husband and wife. Strictly speaking, such relations were now for the first time recognized. They resulted, however, not directly from the establishment of the conjugal relation, but from specific acts of the parties or of persons acting in their behalf.

In Teutonic law the domination of the man was not immediately connected with conceptions of power and force. The element of guardianship was the characteristic feature. Primitive law, however, emphasized the rights instead of the duties of the guardian. By the marriage, the woman, with her property, passed from the control of her father to that of her husband. Whether the latter became the owner of such property is a disputed question.³ Where the Raubehe

¹ Sohm, Inst., §§ 93, 94; Muirhead, Roman Law, p. 27.

² Sohm, Inst., §§ 93, 94.

⁸ Heusler, Inst., vol. ii, pp. 294 seq., 303 seq.; Schröder, Lehrbuck, p. 304, n. 196.

was the typical form of marriage, there could be no question of legal property relations between the parties. This was not necessarily true of the *Brautkauf*, and it is clear that at an early period certain property was recognized as belonging to the wife.⁴ The husband, as the guardian of the wife, continued to administer such property.

The development was influenced by local conditions, as a result of which distinct types appeared. Upon one side, the Germanic conception of society or partnership found expression in various forms of community of property. On the other hand, the principle that the wife or some one acting for her should make a contribution to support the common expenses was embodied in the systems of marital usufruct.

The English common law represents a type of the system of exclusive rights of the husband, though particular modifications, in derogation of the general principle, are to be noted.⁵ The husband is entitled to the sole administration of all of the wife's property. All of the personal property which he brings into his possession, becomes his property. For the real property the principle of marital administration and usufruct obtains. The husband cannot affect the substance of such property, but he is entitled to the income and profits and is not required to account for the same. In addition, the husband has the right to his wife's services and to all that she may acquire by her personal activity. Connected with these extensive privileges is his liability for the wife's obligations, whether arising in contract or in tort.⁶

⁴ The wife brings with her a species of dowry (Gerade); the husband makes certain gifts to the wife, e. g., the dos, which Tacitus describes, Morgengabe, etc.

⁶ It does not follow that these arose as limitations upon the absolute powers of the husband. Quite the converse may have been true. They may be the remains of a system which accorded the wife greater rights, of which a later period deprived her; cf. Pol. & Mait., Hist., vol. ii, pp. 400, 401.

⁶ Pol. & Mait., Hist., vol. ii., pp. 401-403.

The dower of the wife and the curtesy of the husband were distinguishing features of the common law system. the beginning of the thirteenth century, the principle was established that a widow is entitled to an estate for life in one-third of all the lands of which the husband is seized of an estate of inheritance during the marriage. The husband could not limit this privilege of the wife, and it was not subject to the claims of his creditors. While primarily intended as a provision for the widow, it was something more than a mere right of succession. The wife acquired a form of proprietary right in her husband's lands. While she could not make good her claims during the marriage, they would attach so as to enable her, upon the death of her husband, to follow lands which he may have alienated during the marriage, without her consent, given in the formal manner required.7

The husband, upon the birth of issue of the marriage, became entitled to a tenancy by the curtesy, for his life, in all of the lands of which the wife was seized during coverture. The effect of the fulfillment of the condition was to extend the husband's interest in the wife's lands from an estate for their joint lives to an estate for his life.8 It is somewhat analogous to the continued community, where the matrimonial property relations are practically unaffected by the dissolution of the marriage so long as one of the parties survives. In effect, the husband's guardianship of the matrimonial property was extended so as to apply, during his life, to the share falling to the issue of the marriage. It is necessary to note, however, that while the birth of such issue was essential to the extension of such guardianship, the latter continued, notwithstanding the fact that no issue survived at the death of his wife.

⁷ Ibid., p. 418 seq.

8 Ibid., p. 412 seg.



These are the fundamental features of the common law matrimonial property system which obtained in England and was carried over into the legal systems of most of the American states. It was adapted to a rude state of society, where personal property was of little consequence. With the increasing importance of the latter, the hardships of the system made themselves manifest, and remedial measures became necessary.9

DIVISION II.

MARITAL ADMINISTRATION AND USUFRUCT.

§ 26. General Character of the Wife's Property.

The general principle at the basis of the system of marital administration and usufruct is that, as a result of the marriage, the property which the woman possesses and that which she afterwards acquires pass into the administration of the husband, who is entitled to the use and proceeds of the same. The title to such property remains in the wife. Thus, by operation of law, the property of the married woman becomes dotal in character.

An exception to the general rule arises in the recognition that certain kinds of property are excluded from the husband's control and enjoyment, and are reserved for the administration and usufruct of the wife. The character of the system and the position of the wife with respect to her

^{*} See post, § 37.

¹Germany, B. G., § 1363; Prussia, A. L. R., ii, I, § 200; Saxony, B. G., § 1655; France, C. C., 1529 seq.; Glaris, L. B., ii, art. 172; Lucerne, Stat. Nov. 26, 1880, art. 6; Zürich, P. R. G., §§ 589, 593; Switz., Vorentwurf, 226 seq. In a few of the Swiss legislations the husband becomes owner of the wife's fortune, and is responsible for its value (Lardy, Législations Suisses, pp. 27, 65). In many cantons his unlimited powers of disposition produce practically the same result (cf. post, § 27, note 2).

property will be affected by the extent of the separate property which obtains.

Separate property may arise as a result of contract between the parties,³ by the act of a third party, where property accrues to the wife by donation or succession, and the donor or testator provides that it shall become her separate property,⁴ or by operation of law. While the two former sources may lead to a wide extension of separate property, it is the last which is of chief importance in determining the general property rights of married women under any particular system.

The legislations, in general, accord the character of statutory separate property to all things which are intended for the sole personal use of the wife.⁵ According to the three preliminary drafts of the code of Germany such objects were dotal property (*Ehegut*), but were excluded from the marital usufruct.⁶ Thus, the husband could control the disposition of such property.⁷ In the code, as finally adopted, this position was rejected. The articles are in-

² In the consideration of systems of individual property the terms "dotal" and "separate" property are used in the same sense as that previously indicated under systems of community. Under individual systems, however, the proceeds of dotal property go to the husband alone. *Cf. ante*, §15.

⁸Germany, B. G., § 1368; Prussia, A. L. R., ii, I, § 208; Saxony, B. G., §§ 1691, 1693; France, C. C., 1387; Lucerne, but cannot exceed one-third of the fortune of the wife, Stat. Nov. 26, 1880, art. 11; Zürich, P. R. G., § 597; Switz., *Vorentwurf*, 216; cf. ante, § 12.

⁴ Germany, B. G., § 1369; Prussia, A. L. R., ii, 1, § 214; Saxony, B. G., § 1693; France, C. C., 1401; Lucerne, Stat. Nov. 26, 1880, art. 11; Glaris, L. B., ii, art. 174; Zürich, P. R. G., § 597; Switz., Vorentwurf, 216.

⁸ Germany, B. G., § 1366; Prussia, A. L. R., ii, 1, § 206; Saxony. B. G., § 1671; Lucerne, Stat. Nov. 26, 1880, art. 11; Glaris, L. B., ii, art. 174; Zürich, P. R. G., § 597; Switz., *Vorentwurf*, 217.

^{*}I. Entwurf, § 1285; II. Entwurf, § 1282; III. Entwurf, § 1354.

⁷ In Saxony the husband could prevent the wife from making any other than the intended use of such objects. E. G., § 1671.

cluded in the statutory separate property of the married woman, and, as such, are subject to the exclusive administration as well as the enjoyment of the wife. Statutory reserved property also includes the things accruing from or taken in exchange or as compensation for separate property.

Under individual systems, the principle that the husband has an exclusive right to the services, and hence to all of the personal acquisitions of his wife, is apt to entail greater hardships than it produces in systems recognizing a community of property interests. Under a strict application of the principle, all that the wife acquires by her industry would become the husband's sole property. The legislations have, therefore, generally modified the rule so as to secure to the wife an interest in the products of her personal activity. the more recent legislations this has been accomplished by giving the character of statutory separate property to that which is the result of her labor or is acquired in a business which she carries on independently of her husband.10 The older codes, however, regard such property as dotal property, the capital of which is preserved for the wife, while the husband has the use of the same.11

B. G., §§ 1366, 1371, 1427 seq.

⁹ Germany, B. G., § 1370; Prussia, A. L. R., ii, 1, § 217; Saxony, B. G., § 1693; Lucerne, Stat. Nov. 26, 1880, art. 12.

¹⁹ Germany, B. G., § 1367; Lucerne, Stat. Nov. 26, 1880, art. 11; Zürich, limited to that which she acquires in an independent occupation or industry, but includes capital as well as profits so long as such activity is continued, P. R. G., § 621, 622; Switzerland, all property employed in business become separate property, *Vorentwerf*, 217.

¹¹ Prussia, A. L. R., ii, 1, § 220; if business is transacted entirely with her separate property, the income will have the same character, *ibid.*, § 219; Saxony, B. G., § 1668. In many of the Swiss cantons the husband becomes owner of the property which the wife acquires by her personal industry: Glaris, L. B., ii, art. 173; Zürich, so far as it is not acquired in an independent occupation, P. R. G., § 593; cf. Lardy, Législations Suisses, pp. 8, 17, 27, 65, 175, 204, 277, 299, 303, 347.

§ 27. Administration of the Wife's Property.

The husband is the administrator of the dotal or matrimonial property. He is entitled to take possession of it and to exercise all functions connected with its ordinary administration. To this extent, there is general agreement among the codes. Marked divergence appears, however, respecting the further extension of his powers, and particularly with reference to his right to dispose of the property. Many of the Swiss cantons emphasize the exclusive rights of the hus-In some cases he becomes owner of the wife's property subject to the obligation to return its value.1 In other instances he is given an absolute right of disposing of all of the dotal property subject to the same liability.² The wife or her representatives will receive the value of the property which she has brought into the marriage without any deduction for the losses, or any claim to a share in the gains which have accrued.3

The German systems and the Swiss draft code, however, start with the general principle that the wife's property shall be kept intact, and that the husband shall not dispose of the substance of the same nor bind it in any way without the consent of the wife. The rule is similar to that which governs the relations between the owner and usufructuary in an ordinary usufruct. This principle, however, is not rigorously maintained in the case of the ordinary usufructuary, and it is naturally modified in the interests of the marital administra-

¹ Ante, § 26, note 1.

² Glaris, L. B., ii, arts. 172, 177; cf. Lucerne, Stat. Nov. 26. 1880, arts. 5-7; Lardy, Législations Suisses, pp. 8, 17, 125, 176, 204, 217, 293, 303.

⁸ Contra in Glaris, where the wife is entitled to profit upon sales of her property. She also suffers the losses in such cases if husband proves that same are not due to his fault. L. B., ii, art. 177.

⁴ Germany, B. G., § 1375; Prussia, A. L. R., ii, 1, § 231 seq.; Saxony, B. G., § § 660 623; Switz., Vorentwurf, 230.

tion. So far as immovables are concerned, the general rule is maintained that they cannot be alienated or encumbered without the consent of the wife.⁵

It is with respect to the disposition of movables that the codes begin to differ. Some accord the husband the general right of disposition, limited, of course, by his obligation to restore the value of the objects alienated. Others tend to make the right of disposition as limited as that possessed by an ordinary usufructuary. Important considerations are connected with the determination of this matter. The free activity of the husband may be required in the interests of the matrimonial property. The interests of the wife, on the other hand, may necessitate protection against the acts of the husband affecting the substance of such property. It is undesirable, moreover, to adopt provisions that may encourage legal proceedings between married parties. Finally, the power of disposition must not be of such a character as to deceive third parties.

The first draft of the German code placed chief stress upon the husband's right of usufruct. It did not treat his right of administration as a personal right resulting from the

⁵ Germany, B. G., § 1375; Prussia, A. L. R., ii, 1, § 232; Saxony, B. G., § 660; France, C. C., 1428; Lucerne, Stat. Nov. 26, 1880, art. 7; Zürich, P. R. G., § 591; Switz., Vorentwurf, 230; cf. Lardy, Ligislations Suisses, pp. 39, 87, 278, 348.

⁶ Prussia, A. L. R., ii, 1, § 247, but not of capital invested in the name of the wife, or of her donor or testator, *ibid.*, § 233; France, C. C., 1531, 1532; Lucerne, if by ante-nuptial contract this right of disposition is restricted, the titles of ownership of the wife must be publicly registered, Stat. Nov. 26, 1880, art. 6; Zürich, P. R. G., § 590; *f.* § 592.

⁷Saxony, B. G., §§ 660, 1655, 1674, 1677; Lardy, Ligislations Suisses, p. 277. The Swiss draft code provides that the husband cannot dispose, without the wife's consent, of any of the marital property, of which he has not acquired the ownership. It raises a presumption of the consent of the wife for the benefit of innocent third parties, except where it should have heen clear to every one that the property belongs to the wife (Vorentwurf, 230). If husband has given security for the movables he may freely dispose of the same (ibid., 231).

establishment of the marriage relation, but defined it independently and limited it to very narrow bounds. was placed upon the fact that he was the administrator of property of which the title was in another person. for all important acts of administration he must act with the authorization of such party, and in the name of the latter.6 It was expressly provided that the general rules governing the administration of property subjected to a usufruct, should apply to the husband's usufruct in the matrimonial property, except where the code provided otherwise. So, also, his powers of disposition were limited to the alienation of objects whose use in general consisted in their consumption,10 and to such acts, in the name of the wife, as were necessary to fulfill obligations binding upon the dotal property." For all other acts of disposition he must have the authorization of the wife to act in her name.12

These provisions of the draft code became the subject of severe criticism on the part of those who conceived that the establishment of the property relations between husband and wife, upon the same basis as that existing between an owner and a usufructuary, was contrary to the true conception of the conjugal relationship. They insisted that the husband's right was something more than that of a simple usufructuary; that his right of administration flowed directly from the personal relation which the marriage established, and was not a mere incident of his right of usufruct. It was argued that the provisions of the draft code would tend to the detriment of the matrimonial property, and that the right of either party to maintain judicial proceedings against the other, for claims arising out of the marital administra-

⁸ I. Entwurf, §\$ 1317-1325.

^{*} Ibid., § 1292.

¹⁰ Ibid., § 1294.

¹¹ Ibid, § 1318.

^{1?} Ibid, § 1319.

tion, would lead to conflicts between the husband and wife which would destroy the family unity.12

These arguments had weight, and in the later drafts and the code as finally adopted, the husband's right of administration is regarded as a direct outgrowth of the matrimonial relationship." By virtue of the marriage the husband acquires the personal right of administering the dotal property, though in the interests of the wife, this general right is limited by important exceptions, A middle ground is taken between the two extreme views respecting the husband's right to dispose of the dotal property. The positive acts that he can perform without the consent of his wife include those recognized in the first draft code, and in addition, the right to dispose of money and other consumable objects. The latter include things whose customary use is exchange or alienation, e. g., a stock of goods, as well as those whose customary use lies in their consumption.¹⁵ Moreover, the husband disposes of such objects in his own name, and he can legally enforce in the same manner all rights connected with the dotal property.16 If the matter is one over which he can dispose without the assistance of his wife, the judgment in such process will be binding upon her. On the other hand, the husband is not permitted to dispose of other movables without the consent of the wife," but, following the

¹³ Brühl, "Die eheliche Nutzniessung," Arch. f. d. civ. Prax., vol. 73, p. 408 seq.; Gierke, Entwurf, pp. 409, 410, 412-414; Mitteis, "Bemerkungen zum ehelichen Güterrecht," Zeit. f. d. Privat. u. öff. Recht., vol. 16, pp. 545, 582.

¹⁶ II. Entwurf, §§ 1272–1293; III. Entwurf, §§ 1356–1377; B. G., §§ 1373–1394.

¹⁶ Germany, B. G. §§ 1376, 92; cf. Switz., Vorentwurf, 229.

¹⁶ Germany, B. G. § 1380.

¹⁷ The second and third drafts of the code permitted the husband to collect non-interest bearing demands without the consent of his wife (II. *Entwurf*, § 1275; III. *Entwurf*, § 1359), but this provision was stricken out in the final revision.

practice of other systems, it is provided that such consent may be supplied by the court when it is refused on insufficient grounds, or when the absence or illness of the wife prevents her from giving her consent.¹⁸ Finally, it is necessary to note that the personal character of the husband's right of administration and usufruct is emphasized by his inability to alienate his right as such.¹⁹

The husband's power of administration is protected against interference on the part of the wife. The latter has no general right of disposition over the dotal property. She is prevented from encumbering or otherwise disposing of the same, by virtue of her general incapacity to contract without the marital authorization,²⁰ or in those systems which recognize the general contractual capacity of married women, by positive provisions making such dispositions dependent upon the consent of the husband.²¹ The dispositions made without the husband's consent are ineffective so far as regards the dotal property, but they may be binding upon the wife's separate property.

The wife is not entirely excluded from acts of administration or disposition over the dotal property. She may bind the latter within the sphere of her activity as administrator of the domestic affairs of the household," or in an independent business which she carries on with the consent of her husband." The wife does not require the marital

¹⁸ Germany, B. G., § 1379; cf. Prussia, A. L. R. ii. 1, § 299; Saxony, B. G., § 1657.

¹⁹ Germany, B. G., § 1408.

²⁰ Ante, § 3.

²¹ Germany, B. G., § 1395; Prussia, A. L. R. ii. 1, § 320; Saxony, B. G., § 1638; Switz., Vorentwurf, 232.

²² Ante, § 8.

²³ Ante, § 6; Germany, B. G., § 1405; Prussia, A. L. R. ii. 1, §§ 335-337; France, C. C., 220; Lucerne, Stat. Nov. 26, 1880, art. 17; Zürich. P. R. G., §§ 621, 622; Glaris, L. B. ii., art. 175.

authorization for the acceptance or rejection of gifts or successions which fall to her,³⁴ or for the carrying on of certain judicial processes for the protection of her rights.³⁵ Where other acts of the wife are necessary, the court may supply the consent of the husband if it is refused without sufficient reason.³⁶ Such acts may also be performed by the wife without the consent of the husband where the latter on account of illness or absence is prevented from manifesting his will and there is risk of damage from delay.³⁷

The property which is reserved for the wife under the system of marital administration and usufruct, is subject to the same rules of administration as obtain for the wife's property, in general, under the system of separate property.

§ 28. Liability for Debts.

The husband enjoys the fruits of the matrimonial property and he is accordingly subject to the obligations of a usu-fructuary. As such, he must defray the costs of administration, and meet the public and private obligations which are binding upon the dotal property. He is not under a general obligation to answer for the debts of his wife, his liability being connected with his relation to the matrimonial property rather than his personal relation to his wife. The husband is under a personal obligation to support the

MGermany, B. G., § 1406; contra, Switz., Vorentwurf, 232.

²⁵ Germany, B. G., §1407.

^{*}Germany, B. G., § 1402; Saxony, B. G., § 1644; France, C. C., 218, 219; Switz., Vorentwurf, 232.

²⁷ Germany, B. G., § 1401; Prussia, A. L. R., ii, 1, §§ 202-204, 326, 327; Saxony, B. G., § 1643; cf. France, C. C., 1427.

¹⁶ Post, § 42.

¹ Germany, B. G., §§ 1383-1388; Prussia, A. L. R., ii, I, § 231; Saxony, B. G., § 660; France, C. C., 1533; Lucerne, Stat., Nov. 26, 1880, art. 13; Glaris, L. B., ii, art. 176; Switz., *Vorentwurf*, 228, 232.

family, and he may be liable for debts which the wife contracts for this purpose.

While the husband is under no general liability for the debts of the wife, the dotal property, of which he has the usufruct, is subject to such charges.4 This liability does not extend to obligations arising from post-nuptial contracts of the wife, made without the necessary consent of the husband, or which have been incurred in the administration of her separate property.6 The creditors, in such cases, can hold the dotal property, during the continuance of the marital usufruct, only to the extent to which such property has been enriched by the act.'

As between the married parties, compensation is due from the separate property to the dotal property, when the latter is diminished by reason of the payments of obligations arising from torts or unlawful acts committed by the wife.8 The same is true when the wife's expenses in a judicial pro-

² Germany, B. G., § 1389; Prussia, A. L. R., ii, I, §§ 185 seq., 321; Saxony, B. G., §§ 1634, 1635; France, C. C., 1530; Lucerne, Stat., Nov. 26, 1880, art. 2; Glaris, L. B., ii, arts. 169, 170.

³ Ante, § 8. In the German code it is provided that the wife may demand that the net income of the dotal property, so far as it may be necessary for the support of the family, shall be applied to that purpose without regard to the other obligations of the husband, B. G., § 1389; cf. Zürich, P. R. G., § 594.

Germany, B. G., § 1411; Prussia, A. L. R., ii, 1, § 338; Saxony, B. G., § 1679; Glaris, L. B., ii, art. 176; Lucerne, Stat., Nov. 26, 1880, art. 13; Switz., Vorentwurf, 233, 235.

b Ante, § 27.

Germany, unless they arise out of an independent business which she carries on with husband's consent, B. G., §§ 1413, 1414; Prussia, A. L. R., ii, 1, § 229; Saxony, B. G., § 1640.

⁷Germany, B. G., § 1399; Lucerne, Stat., Nov. 26, 1880, art. 13; Glaris, L. B., ii, art. 175.

⁸Germany, B. G., § 1415; Saxony, B. G., § 1680; cf. Prussia, A. L. R., ii, 1, **§§** 339, 340.

ceeding with her husband are defrayed out of the dotal property.

§ 29. Protection of the Wife's Property.

In addition to the limitations placed upon the administration of the husband, the legislations generally provide special means for the protection of the property rights of the married woman. The presumption, which is raised in favor of creditors, that existing movables belong to the husband, may be rebutted by an inventory. It is also recognized that the wife may demand that the husband shall furnish particular security for the property of which he has the administration. While the states generally give the wife all the rights of an ordinary creditor of the husband, some legislations go further, and concede her a right of registering a mortgage in her favor over the immovables of the husband, or accord her special privileges in the latter's bankruptcy. Where these privileges exist, the husband's right

⁹Germany, same principle applies to costs of legal proceedings in general, B. G., § 1416; Saxony, B. G., § 1681.

¹ Ante, § 5.

² Germany, B. G., § 1372; Glaris, L. B., ii, art. 177; Lucerne, Stat., Nov. 26, 1880, arts. 8–10; Zürich, P. R. G., § 604; cf. Prussia, A. L. R., ii, 1, § 544; Saxony, B. G., § 1656; Austria, B. G., § 1237; France, C. C., 1532.

^a Only when her rights are endangered: Germany, B. G., §§ 1391-1393; Prussia, A. L. R., ii, I, § 255; Lucerne, Stat., Nov. 26, 1880, art. 18; at any time: Zürich, P. R. G., § 604 seq.; Switz., Vorentwurf, 213.

⁴ Prussia, A. L. R., ii, 1, § 254, limited to one year from beginning of husband's administration, Stat. of May 8, 1855, G. S. S., p. 317; Saxony, B. G., § 390; ef. France, C. C., 2135, 1540.

⁵ Glaris, L. B., ii, art. 178; Lucerne, Stat., Nov. 26, 1880, art. 23; Zürich, P. R. G., § 611; Lardy, *Ligislations Suisses*, pp. 9, 27, 40, 66, 176, 217, 292, 303, 348. The Swiss federal law of bankruptcy places the wife, where her privilege is recognized by cantonal law, in the fourth class of creditors, but the privileged share of her property cannot exceed one-half, Alexander, *Konk.-G.*, p. 307. A similar privilege, recognized in Prussia (A. L. R., ii, 1, § 259; *Konk. Ordnung*, § 80, G. S. S., 1855, p. 321), was abrogated when the imperial law of bankruptcy was introduced in 1877 (*Konk. Ordnung*, § 54, R. G. Bl., pp. 351, 362).

of administration is generally quite extensive, and the tendency is for them to disappear as limitations are placed upon the husband's power. While affording adequate protection to the wife, they constitute a serious detriment to the marital administration and a menace to the interests of third parties.

The final remedy, which the wife possesses for the protection of her property interests, is her right to demand that the marital administration and usufruct be terminated. In the new code of Germany, this power, and the privilege of demanding security when her rights are endangered, are made more effective by the fact that the husband is under an obligation to render the wife a statement of the condition of the administration of the dotal property.

§ 30. Termination of the Marital Administration and Usufruct.

(a) As the Legal Result of Bankruptcy.

The system of marital administration and usufruct does not recognize any community of property interests between the married parties. It is indeed to meet the matrimonial expenses that the husband has the use of the wife's property; but in case he falls into bankruptcy, his personal creditors acquire a claim upon the fruits of such property and may thus defeat the ends for which it was established. Accordingly, the more recent legislations recognize that the bankruptcy of the husband has the legal effect of terminating his administration and usufruct of the dotal property.'

Ante, note 3.

⁷ Germany, B. G., §1374.

¹ Germany, B. G., § 1419; Switz., bankruptcy of either party, *Vorentwurf*, 197. Until the settlement of the bankruptcy or satisfaction of creditors: Lucerne, Stat., Nov. 26, 1880, art. 19; Zürich, P. R. G., § 613.

(b) Upon the Demand of the Wife.

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The existing legislations generally agree in recognizing that the bankruptcy of the husband or irregularities in his administration of the dotal property justify the wife in demanding the termination of the marital administration and usufruct. The failure of the husband to fulfill his statutory obligation to provide for the support of the family is also a valid ground for such demand. The fact that the husband is under guardianship has also been recognized by the German code as sufficient ground for the demand for a cessation of the marital administration and usufruct, but the attainment of full capacity by the husband will enable him to demand the restoration of his marital property rights.

The legislations do not recognize that the husband has the right to demand the dissolution of the matrimonial property relations where the marital administration and usufruct obtain.⁵

(c) By Mutual Agreement.

Where post-nuptial marriage agreements are not prohibited, the termination of the marital administration and usu-fruct may be brought about by agreement between the parties, subject to the observance of such formalities as the law may provide to safeguard the rights of third parties.⁶

²Germany, B. G., § 1418; Prussia, A. L. R., ii, 1, § 258; France, C. C., 1443; Glaris, L. B., ii, art. 179; Lucerne, Stat., Nov. 26, 1880, art. 18; Zürich, P. R. G., § 594; Switz., *Vorentwurf*, 198. In Saxony, the wife may demand that the administration shall be given to her. This will not affect husband's right of usufruct, B. G., §§ 1684, 1685; *cf. ante*, § 22, notes 9, 10.

³ Germany, B. G., § 1418; Prussia, A. L. R., ii, 1, §§ 256, 258; Switz., Vorentwarf, 198; Lucerne, Stat., Nov. 26, 1880, art. 19; Zürich, P. R. G., § 594.

⁴ B. G., §§ 1418, 1425; cf. Lucerne, Stat., Nov. 26, 1880, art. 20, Zürich, P. R. G., § 614.

⁶ Motive, vol. iv, p. 294; Prussia, A. L. R., ii, 1, § 251; Saxony, B. G., § 1686; France, C. C., 1443; contra, Switz.. Vorentwurf, 199.

⁶ Germany, B. G., § 1435; Prussia, A. L. R., ii, 1, §§ 251, 252; Switz., Vorentworf, 195; cf. Saxony, B. G., § 1694.

(d) By the Dissolution of the Marriage.

The dissolution of the marriage by the death of one of the parties or by decree of divorce leads regularly to a cessation of the marital administration and usufruct.⁷ No provisions exist for a continuation of the property relations between the surviving married party and the common children.

§ 31. Effects of the Termination of the Marital Administion and Usufruct.

The general rule is that, upon the termination of the marital administration and usufruct, the dotal property is to be immediately returned to the wife or her representatives, in accordance with the regulations governing the ordinary usufruct.¹ The property, so far as it still exists, is to be returned,² and compensation must be rendered for the remainder, except where it has been destroyed without fault on the part of the husband.

The codes differ with respect to the compensation due the husband on account of expenditures which he has incurred for the dotal property, over and above those which he is legally obliged to sustain. The older codes require that these expenditures shall have been made with the consent of the wife.³ If the husband has made the expenditure with-

⁷ Regarding effects of judicial separation, see ante, § 23, (d). Lucerne, Stat., Nov. 26, 1880, art. 19.

¹ Germany, B. G., §§ 1421, 1423; Prussia, A. L. R., ii. 1, §§ 548 seq.; 559 seq.; 570 seq.; 585 seq.; 595 seq.; interest can be demanded only after the expiration of the first quarter, if usufruct is terminated by death of either party, ibid., § 549; Saxony, B. G., §§ 1688, 1689, 660; Glaris, L. B., ii, art. 177; Lucerne, Stat., Nov. 26, 1880, art. 21; Zürich, P. R. G., § 609.

² In Prussia, in case the marital usufruct ceases as a result of the death of the wife, the husband had an election between returning the real estate or its value, A. L. R., ii, I, § 570 seq.

⁶ Prussia, A. L. R., ii, 1, §§ 587, 588; Saxony, B. G., § 1690.

out the consent of the wife or the authorization of the court, he will be treated as an ordinary usufructuary and entitled to take back the improvements in so far as this is possible without producing alterations in the previous condition of the property.⁴ The new German code adopts a more liberal attitude. It regards the husband, where he was justified in considering the expenditure necessary, as occupying the same position as one acting under a mandate, and as such entitled to compensation.⁵

If the conjugal community is not suspended or dissolved, the matrimonial property relations for the future will be regulated by the system of separate property.⁶

The legislations are divided regarding the effects of divorce upon property rights. Some do not accord any privilege to the innocent party aside from a claim to support,7 while others recognize the right to demand particular compensation.8 Where the marriage is dissolved as a result of the death of one of the parties, the dotal property will be returned to the wife or go over to her estate in succession.

⁴ Prussia, A. L. R., ii, 1, \$536, i, 21, \$\$ 124-131; according to the code of Saxony he would be treated as one acting without a mandate and hence entitled to compensation to the extent to which the property was enriched, B. G., \$ 1690; cf. Lucerne, Stat., Nov. 26, 1880, art. 21.

B. G., § 1390; cf. ibid., § 670.

⁶Germany, B. G., § 1426; France, C. C. 1443 seq., 1449; Lucerne, Stat., Nov. 26, 1880, art. 22; Switz., Vorentwurf, 197 seq.; contra, Prussia, where existing system continues with the wife as administratrix and usufructuary, subject to the same obligations as were imposed upon the husband, A. L. R., ii, 1, §§ 258, 261 seq.; cf. Saxony, B. G., §§ 1684, 1685. In Zürich the dotal property will be administered under control of the court of guardians, P. R. G., § 594.

⁷ Motive, vol. iv, p. 228 seq.; Germany, B. G., §§ 1578-1585; Saxony, B. G., § 1750.

⁸ Prussia, A. L. R., ii, I, § 766 seq.; France, C. C., 299 seq.; Lucerne, Stat., Nov. 26, 1880, art. 25; Switz., Vorentwurf, 170.

DIVISION III.

SYSTEM OF DOWRY.

§ 32. General Character of the Wife's Property.

The general principle at the basis of the system of dowry, as it is defined in the law of Justinian and in modern legislations, is that the marriage, as such, does not affect the legal proprietary relations of the parties. Nevertheless, the establishment of the conjugal relation, by producing certain effects upon the personal relations of the parties, may exercise an influence upon their property rights. Moreover, the marriage regularly leads to other legal acts that result in the establishment of matrimonial property relations. The most important of these acts is the constitution of the dowry and the establishment of certain benefits for the wife.

The early Roman law of dowry was subjected to profound modifications as a result of juristic and legislative activity. Modern Roman law, however, exhibits distinct traces of its development from the primitive system. The dowry is primarily a contribution which the wife, or some one acting in her interest, makes to the husband to assist him in fulfilling his obligation of supporting the expenses of the matrimonial community.2 In the second place, the dowry is intended as a means of future provision for the wife, and, as such, is to be preserved and returned to her upon the dissolution of the marriage.3 This latter characteristic of the dowry was not recognized in the older Roman law. Custom led to its gradual introduction and establishment. The husband in some cases was bound by an express agreement to return the dowry. In other instances the wife was granted an actio

¹ Cf. ante, §§ 4, 5.

¹Austria, B. G., § 1218; France, C. C., 1540; Italy, C. C., 1388; La., C. C., 2335.

^{*} Post, § 36.

rei uxoriæ, under which the husband, while not bound in law to return the dowry, could be compelled to act in accordance with the principles of equity and good faith. At a later period, imperial legislation completed the development by making provision for the preservation of the dowry during the period of the husband's administration, and by enabling the wife to maintain a personal action against the husband for the return of the same or to sue as owner of the dotal effects.

The marriage does not give the husband a right to demand a dowry.⁶ The latter is not established by the law as in the system of marital administration and usufruct. The dotal property, under the system of dowry, must have been given or promised to the husband.⁷ The legal rules govern the dotal relation only after it has been established by the act of the parties or of persons acting in their interest.

While the dowry was not an essential feature of the marriage relation, it was, nevertheless, the general custom during the Roman period, for the woman to bring her husband a dos. An unendowed wife was apt to be regarded as resting under a stigma, an attitude which obtains to-day in some European countries. Thus, the Roman law and some European systems recognize that the daughter has a legal right to demand a dowry from her father or parents.⁸

⁴ Sohm, Inst., § 95. ⁵ See post, §§ 33, 34.

⁶ Windscheid, Pandekten, vol. ii, § 493; Dernburg, Pandekten, vol. iii, § 15.

¹France, C. C., 1540, 1543; Italy, C. C., 1388, 1391; Spain, C. C., 1336; La., C. C., 2338; Austria, B. G., §§ 1218 seq., 1225. In Austria, under the influence of the German principles of marital administration and usufruct, the presumption obtains, so long as the wife does not contradict it, that she has entrusted her husband with the administration of her property, and in this case, he is entitled to the fruits and profits. But his right ceases from the moment the wife manifests her opposition. Ibid., §§ 1238, 1239.

⁸ Windscheid, *Pandekten*, vol. ii, § 493; Dernburg, *Pandekten*, vol. iii, § 15; Austria, B. G., § 1220; Spain, C. C., 1340; cf. Saxony, B. G., § 1661 seq., Germany, B. G., § 1620.

The Roman law developed side by side with the dos, the donatio propter nuptias.9 This is a gift from the husband to the wife, intended as a future provision for the latter and made to take effect upon the dissolution of the marriage. The wife, in the free marriage at Roman law, had only a distant limited right of succession. The donatio propter nuptias was a settlement which mitigated the hardships resulting from the law of succession as well as from the institution of free divorce. The Austrian civil code, under the title Widerlage, regulates a similar settlement for the wife. In most of the modern codes, however, there is no special definition, the husband being permitted to make gifts to the wife, in augmentation of her dowry, subject to the rules regulating donations and agreements between married parties. 12

All of the property of the wife, including the proceeds of her personal industry, which is not settled as part of her dowry, is her separate property (paraphernalia), and is in general subject to the provisions which regulate the wife's fortune under the system of separate property.²³

§ 33. Administration of the Dowry.

As the dowry is constituted for the primary purpose of assisting the husband in sustaining the matrimonial charges, its administration must be directed to this end. The husband is therefore entitled to the administration of the dotal property. The extent of his rights in this respect was considerably limited in the course of Roman legal development. In the earliest period, the dos, in passing into the possession of the husband, acquired much the same legal character as the other property of a woman who contracted a marriage which brought her under the manus mariti. It became

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<sup>9</sup> Sohm, Inst., § 96.  
<sup>10</sup> Post, § 45.  
<sup>11</sup> B. G., § 1230.  
<sup>12</sup> Ante, §§ 3, 5.  
<sup>13</sup> Contra, Spain, C. C., 1385; cf. post, § 42.  
<sup>1</sup> Ante, § 25.
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as he did of his other property. The measures, referred to in the preceding section, which compelled the restitution of the dowry, did not affect the husband's power of disposition during the marriage. At the outset, they conferred upon the wife a right of action against the husband alone, and hence did not bind the dotal property in the hands of third parties.

The first limitation upon the husband's powers of disposition occurred in the legislation of Augustus. The lex Julia de adulteriis, prohibited the husband from alienating or encumbering certain dotal immovables.² The legislation of Justinian completed the development by extending the limitation to all dotal immovables ³ and by giving the wife other substantial remedies for the protection of her property rights.⁴

In strict form the husband still remains owner of the dotal effects, but it is a form that is deprived of all substance by positive exceptions and limitations. He retains the right of administration, but cannot alienate nor encumber any dotal immovable. For the further protection of the wife, and to guard her from the undue influence of the husband, such dispositions are considered invalid even if made with her consent. Moreover, the wife, in addition to her personal claim against the husband, is given the right to sue as owner for the return of the dowry. As such she can vindicate her immovables, but, with respect to movables, the right is limited to those which have not been alienated by the husband. Justinian's law, in fact, makes the wife the owner of the dowry, but binds her by the valid acts of her

² Bechmann, Dotairecht, vol. ii, p. 445 seq.

³Cod., 5, 13, 15; Nov., 61.

¹ See post, § 34.

⁶Cod., 5, 13, 15; Nov., 61.

Cod., 5, 12, 30; Bechmann, Dotalrecht, vol. ii, p. 468 seq.

marital administrator. The latter is in reality a mere usufructuary, but in accordance with the old theory, he is regarded, pending the wife's action for the restitution of her dowry, as the formal owner, whose activity is subjected to extensive limitations.

In the modern codes, the fictitious elements have largely disappeared. The general principle with which all of the systems start is that the husband is the administrator of the dowry, while the wife is the owner of the dotal effects.7 The husband may and should exercise all of those acts of administration which an ordinary usufructuary has the right and obligation of undertaking. In accordance with the general principles governing usufruct, he becomes owner of that part of the dotal property which consists in money, negotiable instruments or other fungible things, while the wife has only a personal claim for the restoration of the value of these objects. The same result follows where movables are settled in dowry at a fixed estimate, unless it is expressly stipulated that the valuation is not intended to effect a sale of the property.8 On the other hand, the valuation of dotal immovables will not be held to transfer title to the husband unless the sale is proven.9

To the extent that the husband does not become owner of the dowry, he does not possess the right to alienate or encumber the dotal effects. The codes differ respecting dispositions affecting such property. Some, following the

⁷ Austria, B. G., §§ 1227, 1228; France, C. C., 1549, 1551 seq., 1560, 1561; Italy, C. C., 1399, 1401 seq., 1407; Spain, C. C., 1346, 1357; La., C. C., 2350.

⁸ France. C. C., 1551; Italy, C. C., 1401; La., C. C., 2354. In Austria (B. G., § 1228), and Spain (C. C., 1346), the burden of proof is upon the husband and those claiming under him to show that the sale was made.

⁹ Austria, B. G., § 1228; Spain, C. C., 1346; by express declaration: France, C. C., 1552; Italy, C. C., 1402; in Louisiana, they will not pass into the ownership of the husband even if an express agreement has been made, C. C., 2355.

Roman law, make a distinction between dotal movables and immovables. The mortgage or alienation of the latter is in general invalid, even if the wife gives her consent or joins in the act.¹⁰ This rule has been influenced by the fear that the wife will suffer from the undue influence of the husband, as well as by the desire to keep the land intact for the benefit of the family. The provisions do not however constitute an absolute prohibition upon the alienation of dotal immovables. Certain exceptions are recognized on the ground of necessity or evident utility,¹¹ and also where such dispositions have been permitted by the contract of marriage.¹²

The Austrian and Spanish codes do not follow the Roman rule. In the former, there are no limitations upon the married woman's capacity of disposition, and, in accordance with the general principle,¹³ it appears that she can freely alienate the dotal effects without the consent of her husband, subject always to his right of administration and usufruct during the marriage. In Spain, the wife, with the consent of her husband, may alienate or mortgage the dotal effects of which she has the ownership.¹⁴

The codes which distinguish between the disposition of

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¹⁶ France, C. C., 1554; Italy, C. C., 1405; La., C. C., 2357.

¹¹ They may be alienated: With wife's consent to endow children (France, C. C., 1555, 1556; La., C. C., 2358, 2359), or to make exchange for another immovable after official appraisement (France, C. C., 1559); with authorization of court for support of family, to release either party from prison, pay ante-nuptual debts of wife or party settling dower, make necessary repairs to dotal immovables, or affect necessary partition of property held in coparcenary (France, C. C., 1558; La., C. C., 2361, 2362). The Italian code makes a general exception where husband and wife consent and the court authorizes act upon ground of necessity or evident utility, C. C., 1405.

¹³ France, C. C., 1557; Italy, C. C., 1404; La., but value must be reinvested in other immovables, C. C., 2360; *cf. ibid.*, 2355.

¹³ Ante, §§ 2, 3.

¹⁴C. C., 1361. If wife is a minor, the intervention of party from whom dowry proceeds and the consent of the court are necessary.

dotal movables and immovables do not contain any special provisions respecting the alienation of the former. can, accordingly, be disposed of by the wife, subject to the marital authorization which is required for such acts under these systems. 15

§ 34. Protection of the Dowry.

Notwithstanding the limitations placed upon the husband's right of administration, the wife is generally accorded extensive privileges by way of further security for her dotal effects. An explanation of this attitude is to be found in the Roman law, which, while developing the substantial proprietary rights of the wife, continued the formal ownership of the husband. Moreover, the husband, at Roman law, had the power to alienate dotal movables. Accordingly the law of Justinian gave the wife a privileged legal mortgage which extended, independently of registration, over all of the husband's property. Under the modern codes, the wife is unable to revoke any alienation until after the dissolution of the marriage.2 And while it is expressly provided that dotal immovables shall be imprescriptible during the marriage,3 this does not seem to be the rule respecting movables. Finally, it is considered necessary to protect the wife's interest in the estimated dowry, and in that which, by reason of its general character, passes into the ownership of the husband.

The legal mortgage of the wife for the protection of her dowry is recognized by the French and Italian codes. virtue of this mortgage, the wife acquires a statutory lien

¹⁶ Ante, § 3.

¹Cod., 5, 13, 1; Inst., 4, 6, 29; Windscheid, Pandekten, vol. i, § 246, vol. ii, § 503.

² France, C. C., 1560; Italy, C. C., 1407; La., C. C., 2363.

⁸ France, C. C., 1561; La., C. C., 2364, 3524.

over all the immovables possessed by the husband. Such encumbrance obtains by operation of law and does not require public inscription for its validity. Provisions exist for restricting or barring such lien, but all such measures depend upon the express or implied consent of the wife, and judicial or other formalities must generally be observed.

In Spain and Louisiana, the privilege of the wife is restricted to the right to have a mortgage recorded over the husband's property to secure her dowry.⁶ In Austria, the wife is given no particular security by way of mortgage, but it is provided that the one who gives the dowry may demand suitable security, and, where the woman is under guardianship, the guardian can not dispense with such security except with consent of the court.⁷

All of the states recognize that, under certain conditions, the wife may demand that the husband shall be deprived of the administration of the dowry.

§ 35. Separation of Property.

The same conditions which lead to a separation of property under community systems will generally bring about the separation of the dowry from the property of which the husband has the administration. In no case, however, do the modern codes recognize that separation of property is the

France, C. C., 2121, 2135; Italy, C. C., 1969.

France, C. C., 2140, 2144, 2193 seq., Italy, C. C., 1969.

⁶ Spain, C. C., 1349 seq.; where mortgage over husband's property is inadequate to cover value of stocks, bonds, etc., held in dowry, the titles of ownership must be publicly recorded, ibid., 1355; La., C. C., 2376, 2377, 3252, 3254; the wife has also a privilege over ordinary creditors, in the husband's movables, ibid. 2376, 3191.

¹B. G., § 1245.

¹ Ante, § 23.

legal result of the bankruptcy of the husband.² The necessity for such result does not exist under this system as it does under the system of marital administration and usufruct, or even of community. The privileges which the wife enjoys will enable her to protect the dowry and preserve its fruits for the use of the family.

The separation of property may be demanded by the wife and decreed by the court upon the same grounds as would justify such action if community of property obtained between the married parties.3 In Austria, the separation may be the result of mutual agreement, but the principle of the invalidity of post-nuptial agreements forbids this in the other countries.4

The dissolution of the marriage by death or divorce gives ground for the separation of the dowry from the property of the husband. In some cases, as is generally true of community systems, the judicial separation of the parties will produce the same result.5 In others, however, it confers only a right to demand such separation.6

§ 36. Restitution of the Dowry.

The rule of Roman law, which was derived from the old equitable actio rei uxoriæ, was based upon the principle that

² In Austria, while bankruptcy dissolves the community of goods, it will not bring about the separation of property where dowry exists. It does not even justify a demand for the restitution of the dowry, but only a claim to the security for the future, and, under certain conditions, to the enjoyment of the dowry, B. G., §§ 1260, 1261.

France, C. C., 1563; Italy, C. C., 1448 seq.; Spain, C. C., 1365; La., C. C., 2425 seq.

Ante, § 3; Austria, B. G., § 1263.

⁸ Spain, where husband is guilty party, C. C., 73; La., C. C., 155; cf. Austria, B. G., § 1264.

Italy, C. C., 1418; Austria, the innocent party may resist demand, B. G., § 1264.

¹ See, ante, § 32.

it would be unjust to require the husband to return immediately after separation the full amount of the dowry. The husband had the right to alienate movables, and where he had invested the capital resulting from such disposition, as well as from other dotal funds, it might entail considerable sacrifice if he were obliged to call in the same without delay. Hence he was allowed one year within which to make such restitution.² As he was not permitted to alienate immovables, these were to be returned at once.

The modern codes have been influenced by this rule. That part of the dowry of which the ownership remains in the wife, must be restored at once.³ The remainder, including the value of fungible goods and of those objects that have been estimated and sold to the husband, need not be returned until the expiration of one year thereafter.⁴ The husband is not held for the deterioration or destruction of dotal effects of which the wife retains the ownership, unless the damage has occurred through his fault.⁵

If the separation of goods is not accompanied by a dissolution of the marriage, the general rules governing the system of separate property come into operation.⁶

Following the Roman law,7 the modern codes have particular regulations respecting the restitution of the dowry in case the separation of property is the result of divorce.

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² Windscheid, *Pandekten*, vol. ii, § 502; the earlier rule gave him a longer period, *ibid.*, § 502, note I.

⁸ France, C. C., 1564; Italy, C. C., 1409; Spain, C. C., 1369; La., C. C., 2367, 2368.

⁴France, C. C., 1565; Italy, C. C., 1410; Spain, C. C., 1370; La., C. C., 2367, 2368.

France, C. C., 1566, 1567; Italy, C. C., 1411, 1412; Spain, C. C., 1375.

⁶ France, C. C., 1563, 1448 seq.: Italy, but the goods retain the dotal character and must be employed with authorization of the court, C. C., 1423, 1424; Spain, C. C., 1443; La., C. C., 2430, 2434, 2435; cf. Austria, B. G., §§ 1263, 1264, 1237.

¹ Sohm, Inst., § 97.

The innocent party retains while the guilty party loses all of the advantages conferred by the other.⁸ If the dissolution of the marriage results from the death of the wife, her dowry falls into her succession, which is entitled to the profits of the same from the day of the dissolution. If the death of the husband causes the dissolution, it is generally recognized that the wife may elect between the profits of her dowry during the year of mourning and alimentary support from the husband's succession for the same period.⁹

DIVISION IV.

SYSTEM OF SEPARATE PROPERTY.

§ 37. Development of the System.

The system of separate property interests between the husband and the wife obtains as a statutory or contractual system in the legislations of practically all of the important civilized states. In the majority of the legislations it is defined as a distinct system, and where this is not the case, the definition of paraphernal or reserved property (Vorbehaltsgut, biens réservés), provides regulations which may readily lead to the establishment of such a régime. While the system is defined in most of the Continental codes, it is probable that it was not framed in any of them, with the exception of the civil code of Russia, the new code of Germany, and the draft code of Switzerland, with any expectation of its extensive application. Primarily, it was intended to take

⁸ France, C. C., 299, 300; Italy, C. C., 156; Spain, C. C., 73; La., C. C., 155; In Austria, the innocent party may demand the continuation or abrogation of the marriage agreements, B. G., § 1264.

⁹ France, C. C., 1570; Italy, C. C., 1415; Spain, C. C., 1379; La., C. C., 2374. ¹ Cf., table, ante, § 13.

² The Norwegian statute of June 29, 1888 (An. Etran., vol. 18, p. 762 seq.), shows distinct traces of an attempt to introduce separate property as the statutory system.

effect when the statutory system was set aside by operation of law or judicial decree. In England and the United States, on the contrary, it has become the regular statutory system.

The movement which has resulted in the substitution of the system of separate property for the English common law system of exclusive rights of the husband, covers a period of a little more than the latter half of the nineteenth century. It will be necessary to consider only the general character of the development in order to indicate the present conditions and tendencies of legislation in the field of matrimonial property relations.

The essential features of the English common law system have been indicated.³ Whatever may have been the influences which affected and determined its development, it was a system based fundamentally upon the principle of the superiority of the man as the head of the family. It was quite natural that the recognition of the independent existence of the wife should come first from the customary rather than from the statutory sources of legislation. The English Court of Chancery was an organ for realizing social demands to which the conservatism of the legislators failed to respond.

As soon as personal property began to assume importance, the inequitable character of the common law system became manifest. At an early date the Court of Chancery recognized the wife's equity to a settlement out of her personal property which the husband had the legal right of reducing to his possession and ownership. This was a pure and simple act of legislation clothed under the forms of judicial fiction. It was not a principle that applied to all of the wife's personal property. The courts of common law would not enforce it with respect to personal property of the wife which came under their jurisdiction. In the beginning, it

² Ante, § 25.

was only where the husband found it necessary to appeal to the Court of Chancery, in order to gain possession of his wife's personal property, i. e., where the question involved came under the peculiar jurisdiction of such court, that the rule came into operation. The court said in effect: "You have the legal right to this property, but you are asking the assistance of a court whose essential function is the enforcement of equitable principles. It is a fundamental maxim that he who claims equity must do equity. It is unjust (unrighteous) and inequitable for you to take all of the property of the wife and thus leave her without any means of support, except such as you are willing to accord her. Hence, before we will give you possession of this property, you must settle a portion of the same upon your wife."

Beginning with the wife's equity to a settlement, the Court of Chancery gradually developed a system of separate property rights for the married woman, which it enforced, regardless of whether such rights were settled upon the wife by judicial decree, by act of the husband or by the intervention of a third party. It was sufficient if there was a clear intention to set aside the property for the separate use of the wife. In such an event, the Court of Chancery gave the property the character of a trust estate, and enforced the execution of the trust for the benefit of the wife. The estate assumed the character of the separate property, which is reserved under the system of marital administration and usufruct, for the use and profit of the wife.4 The husband's common law rights were excluded, and the property was administered by the wife directly, or through the agency of a trustee, for her benefit.

This system gave efficient relief to those who were enabled to seek the assistance of the lawvers and the courts. But only the more wealthy and intelligent classes could

4 Ante. \$ 26.

avail themselves of such a remedy. In those cases where the rule was apt to work the severest hardships, as in the case of women dependent upon the proceeds of their personal activity, the situation was quite similar to that which may arise under community systems, where the sole protection of the wife is her right to demand separation of property.5 The expense and complex character of the procedure precluded its application to such cases. Moreover, matrimonial property rights which cannot be enjoyed without recourse to legal formalities and judicial procedure must always be limited in the extent of their use and enjoyment. In the great majority of cases, parties on the eve of matrimony will scout the idea of the possible necessity of measures of security against each other. An equitable legal definition of property rights is hence essential, not only for the regulation of the relations in the normal marriage, but also for the protection of those who come to grief as a result of misplaced confidence. It does not necessarily follow that in the normal marriage the actual conditions of the administration and enjoyment of property will conform to the statutory system. Under separate property systems the wife will frequently entrust her property to her husband.6 The existence of legal rules, of which advantage may be taken at any time, will, however, be a guarantee of the preservation of equitable relations between the parties.

The operation of the English system, even after the establishment of the married woman's equitable separate estate, revealed its radical defects. The wife, however extensive the property which she has brought to the husband, has no legal claim to be heard in the matter of its disposition or en-

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³ Ante, § 18.

⁶ It has been declared that it is the custom in Russia for married parties to hold and enjoy their goods in common (Lehr, *Droit Russe*, pp. 17, 41). Practically the same condition may be; found in many American families.

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joyment. However industrious and economical she may be, she can not claim the fruits of her activity, or the results of her savings. The husband, however extravagant, dissipated or worthless, has a legal right to all the acquisitions which proceed from the personal industry of the wife. This right, moreover, is not personal to the husband, but may be taken advantage of by his creditors.

It was under the influence of these conditions that the movement arose during the early part of the nineteenth century for a statutory definition of the married woman's separate property rights. This movement produced its first results in America, in acts according the wife certain rights of ndependent legal activity in case she has been deserted by her husband. These were followed by statutes recognizing her separate rights in particular classes of property, such as in life insurance policies, deposits in savings banks, etc., and exempting such property from the husband's disposition and from liability for his debts.

About the middle of the century statutes appeared which accord the character of separate property to the entire fortune which the wife possessed at the time the marriage was contracted. From this period, the movement became general throughout the United States, one statute being soon supplanted by another affording greater privileges to the married woman. So earnest were the advocates of the reform that in many states, by bringing the question before the legislatures or constitutional conventions, they succeeded in having clauses inserted in the body of the organic law making it mandatory upon the legislative body to provide a system of separate property rights for married women or to

¹ Cf. proposal in France to give the wife in case of husband's misconduct, a right to control the proceeds of her labor, ante, § 18.

^{* 6} Cf. recent similar acts in France and proposal in Belgium, ante, § 18, notes 9. 10; Norway, Stat., June 29, 1888, art. 20.

exempt their property from the husband's disposition or from liability for his debts.9

The legislation in the different states has been influenced by the earlier statutes, but while there is substantial agreement as to general purpose, the details are not worked out harmoniously. Some of the states have gone much further than others. In many instances the acts have been passed without due consideration of the consequences that would result, and it has frequently happened that the legislature, in according the wife free activity, has failed to repeal rules which conceded privileges to her on account of her incapacity of acting.¹⁰ While the principle of separate property interests has been definitely accepted in practically all of the states which do not recognize community property, the formulation of the system has not been perfected. It has become a common saying that every legislative assembly amends the statutes respecting the property rights of married women. The later measures show a tendency to take the form of general statutes, defining systematically the matrimonial property relations." It is quite significant that the recent amendments are often designed to correct, in the interests of third parties, the inconsistencies and lack of equity resulting from some of the earlier acts.

In Great Britain, the movement has been characterized by

⁹ Cf. provisions in Constitutions of: Ala., art. x, § 6; Ark., art. ix, §§ 7, 8; Cal., art. xx, § 8; Fla., art. xi, §§ 1, 2; Geo., art. iii, § 11; Kans., art. xv, § 6; Md. art. iii, § 43; Mich., art. xvi, § 5; Miss., § 94; Nevada, art. iv, § 31; N. C., art. x, §§ 6, 7; N. D., art. xvii, § 213; Oreg., art. xv, § 5; S. C., art. xvii, § 9; S. D., art. xxi, § 5; Texas, art. xvi, § 15: W. Va., art. vi, § 49.

¹⁰ Ante. 87.

¹¹ Several of such acts have been passed during the period in which the present study has been made. See Md., Laws, 1898, c. 457; N. Y. Laws, 1896, c. 272; Dist. of Col., Act, June 1, 1896, U. S. Stat. at Large, vol. 29, p. 193; cf. Penn., Act, June 8, 1893, Laws, p. 344; W. V., Acts, 1893, c. iii. In many states, the periodical revisions of the statutes have produced similar results.

greater conservatism. The legislations of the American states and the results of the same have been carefully investigated by parliamentary commissions. As a result, the statutes are more harmoniously framed and more consistent in their operation than the earlier American statutes. Married Women's Property Act was passed in 1870.12 As was true of the first American statutes, it limited the character of separate property to certain objects,13 and it was not until the Married Women's Property Act of 1882 14 that all the property of the wife became impressed with this character. The above-named acts apply only to England and Ireland, but statutes, passed in 1877,15 1880 16 and 1881,17 introduce substantially the same system in Scotland, subject to modifications resulting from the peculiar development of matrimonial property relations in the latter country. The English-speaking colonies of Great Britain have generally followed the acts of the mother country with respect to the separate property rights of married women.

§ 38. General Character of the Married Woman's Property.

The normal condition under this system is for all the wife's property, of whatever nature, and whenever and however acquired, to be held in her own name, free from any claims on the part of her husband to any interest in the substance or in the fruits of the same. In considering the extent to which this condition has been realized in England and in most of the American states, it is necessary to keep in mind

^{13 33} and 34 Vict., c. 93.

^{13 /}bid., earnings of wife (§ 1), deposits in savings banks, public funds, stock in companies where no liability attaches to holding of the same (§§ 2-5), personal property, not exceeding £200, coming to wife during marriage by deed or succession (§ 7), rents and profits of real property falling to wife by intestate succession (§ 8), policies of life insurance (§ 10).

¹⁴⁴⁵ and 46 Vict., c. 75, § 2.

¹⁶ Act, 40 and 41 Vict., c. 29.

¹⁶ Act, 43 and 44 Vict., c. 26.

¹⁷ Act, 44 and 45 Vict., c. 21.

the fact that the common law system prevails in so far as it has not been abrogated. A number of special privileges accorded the wife in particular kinds of property will not destroy the husband's general and residuary rights. To accomplish this, there must be a positive provision abrogating the common law system, or the wife must be granted general privileges sufficiently comprehensive to exclude the husband's common law rights.

The method pursued at first was to exempt certain kinds of property from the husband's usufruct or right of ownership and to reserve the same as the separate property of the wife.1 This did not establish a system of separate property relations, but created merely a species of separate property for the wife, which was distinguished from her other property over which the husband exercised extensive rights. This separate property has been extended more or less rapidly in its scope until in some states it includes practically all of the property of the wife. Where this condition exists the legislation is generally simplified by the adoption of provisions giving the married woman the right to hold all of her property as a femme sole, or expressly abrogating all of the rights of the husband in his wife's property.

This last stage has been attained in Great Britain and in most of the American legislations, but the method of statutory definition is not the same. As previously indicated, the development of the system has not been completed in many instances, and the statutes in some cases remain in a chaotic condition. In eight of the American legislations positive provisions have been enacted expressly abrogating the common law effects of the marriage upon the property of the wife or of the married parties.² In addition, those

¹ Ante, § 37.

For example of such provisions see past, Appendix, note A; Conn., G. S.,

legislations in which the community system has been introduced, have abrogated the common law rule so far as it obtained among them.³

In the great majority of the states either there is a provision in general terms that all of the property of the wife shall be her separate property or shall be held by her as if unmarried,4 or there is a number of specific enactments followed by such a general clause,5 or there is a series of general grants of property rights to the wife sufficiently comprehensive to produce the same result.6

Finally, there are nine states which, while providing in general or specific terms that all of the property of the married woman shall be her separate property, make an exception of objects donated by or acquired from the husband. Similar limitations, which existed in other legisla-

1888, § 2796; Ky., Stat., 1894, § 2127; Me., R. S., 1883, c. 61, § 2; Miss., An. Code, 1892, § 2289; Mont., C. C., 1895, §§ 213, 220; N. D., R. C., 1895, §§ 2766, 2767; Oklah., R. S., 1893, § 2967; S. D., C. L., 1887, §§ 2588, 2600.

* Ante, § 17 (b).

⁴For examples of such provisions see *post*, Appendix, note B; N. C., Const., art. x, § 6; Ohio, R. S., 1891, § 3114; Oreg., An. Stat., 1887, § 2992, as amended by statute of Feb. 22, 1893 (Acts, p. 170); Penn., Statute of June 8, 1893, § 1 (Laws, p. 344); R. I., G. L., 1896, c. 194, § 1; Va., Code, 1887, § 2284; Hawaii, Laws, 1888, c. xi, § 1; Act, 45 and 46 Vict., c. 75, § 2.

⁵ For example of such provisions see *post*, Appendix, note C; Ala., Code, 1896, §§ 2520-2523, 2530; Ark., Dig. Stat., 1894, §§ 4940, 4945; Ga., Code, § 2474; Md., Laws, 1898, c. 457, § 1; Mich., An. Stat., 1882, § 6295; Minn., G. S., 1894, § 5531: N. J., Act, Mch. 27, 1874, §§ 1, 3, 4, Rev., 1877, p. 636; N. Y., Laws, 1896, c. 272, §§ 20, 21; S. C., C. S. L., 1893, § 2164; Wis., An. Stat., 1889, §§ 2341, 2342, as amended by Laws, 1895, c. 86.

⁶For example of this class see *post*, Appendix, note D; Ill., An. Stat., 1885, c. 68, ¶¶ 7, 9; Ind., An. Stat., 1894, §§ 6962, 6975; Mo., R. S., 1899, § 4340; Utah, R. S., 1898, § 1198; Dist. of Col., Act, June 1, 1896, § 1, U. S. Stat. at Large, vol. 29, p. 193.

⁷ For example of this class, see *post*, Appendix, note E; Col., gifts of money, jewelry and wearing apparel become her separate property, An. Stat., 1891, §§ 3007, 3012; Del., Laws, vol. 15, c. 165, § 1, R. C., 1893, p. 600; Kans., G. S., 1889, § 3752; Mass., gifts of wearing apparel and articles for personal use not

tions, have recently been repealed 8 and the general tendency is to permit such gifts to become the wife's separate property, subject, in some instances, to a proviso that the latter shall be liable for the debts of the husband existing at the time of the gift, and in all cases to the rules against gifts in fraud of creditors.9

Of a similar character are the rules governing the beneficial interest of the wife in policies of insurance upon the life of her husband. It has been indicated previously that such provisions arose before the married woman was accorded a general right of holding her property for her separate use. The acts generally provided that where a married woman was the beneficiary in an insurance policy, whether the latter had been contracted by the husband, the wife or a third party, the proceeds of the same should be for her sole use and benefit. The effect was to create a trust in favor of the With the development of the investment feature in life insurance, the danger arose that such policies in favor of the wife might be utilized for the purpose of defrauding the husband's creditors of the means for satisfying their claims. Hence, in some states, qualifications exist limiting the amount of the annual premium that may be paid out of the property of the husband, and providing that any excess in the premium or in the insurance effected thereby, shall be the husband's property or shall be liable for his debts.10

exceeding \$2,000 in value, become her separate property, P. S., 1882, c. 147, \$\$ 1-3, as amended by Acts, 1884, c. 132 and Acts, 1889, c. 204; Neb., C. S., 1891, \$ 1411; N. H., P. S., 1891, c. 176, \$ 1; Vt., Stat, 1894, \$ 2647; W. Va., Code, 1891, c. 66, \$\$ 2, 3, as amended by Acts, 1893, c. iii; Wy., R. S., 1827. \$ 1558. Cf. ante, \$ 5.

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⁸ Wis., An. Stat., 1889, § 2342, Laws, 1895, c. 86; Dist. of Col., R. S., 1873-74, §727, Act, June 1, 1896, § 1, U. S. Stat. at Large, vol. 29, p. 193.

^{*} Ante, § 5.

¹⁰ The maximum premiums are as follows: Ala., \$500, Code, 1896, § 2535; Mich., \$300, An. Stat., 1882, § 6300; N. Y., \$500, Laws, 1896, c. 272, §22; Ohio,

other states, there is either an express provision that premiums paid in fraud of creditors shall inure to their benefit, or the general rule against such transactions will qualify the wife's interest in such property to the extent that the frauds can be presumed or proven.¹¹

Of the American states in which individual matrimonial property systems exist, Florida and Tennessee are the only ones which fail to recognize that the normal condition of the wife's fortune is that obtaining under the system of separate property. In the former state, the constitution as well as the statutes, declare that the property of the wife shall be her separate property and not liable for the debts of her husband.²² Nevertheless the husband has the administration of such property and the wife is forbidden to sue him for the profits and proceeds of the same. Thus the property of the married woman is dotal rather than separate, and the system is that of marital administration and usufruct. statutes, however, recognize separate property in the strict sense as existing in the earnings of the wife,14 her deposits in banks" and stock held by her in building and loan asso-Moreover, the court, if satisfied as to her qualifications, may, after certain formalities have been observed, grant the wife a license to become a free dealer, in which case all of her property becomes separate and she controls the same as if unmarried.16

In Tennessee it is recognized that separate property of a married woman may be established by donation, testament-

^{\$150,} R. S., 1891, § 3628; Vt., \$300, even if insurance is effected by wife, Stat., 1894, §§ 2653-2657; W. Va., \$150, Code, 1891, c. 66, § 5, as amended by Acts, 1893, c. iii; Hawaii, \$500, Act of 1868, C. L., 1884, p. 429; cf. Wis., An. Stat., 1888, §2347, as amended by Laws, 1891, c. 376.

^{188, §2347,} as amended by Laws, 1891, c. 376.

11 Ante, § 5.

12 Fla., Const., art. xi, §1, R. S., 1892, § 2070.

13 Fla., R. S., 1892, § 2075.

14 Ibid., §2199.

¹⁵ *Ibid.*, §2208. 16 *Ibid.*, §§ 1505–1508.

ary or inter vivos, as well as by grant.¹¹ There is also a statutory separatee state in insurance policies, ¹⁶ deposits in banks ¹⁹ and stock in building and loan associations.²⁰ Moreover, if the husband has deserted his wife or is insane, the latter will acquire property for her separate account.²¹ Under ordinary conditions, however, where no positive stipulations have been made, the woman's property, as a result of the marriage, becomes subjected to the husband's common law rights, which have been modified somewhat in the interests of the wife.²²

In Russia, it is the statutory rule that the marriage does not affect the property of either party. That which the wife possesses at the time of the marriage or afterwards acquires in any legal manner, is her separate property.*3

In those codes in which the system of separate property is a contractual or extraordinary statutory system, it is the regular rule that where such system obtains, all of the wife's fortune shall become her separate property.

§39. Products of the Personal Industry of the Married Woman.

Where the perfect system of separate property obtains, the married woman has the same rights over the proceeds of her personal industry as those which she possesses with respect to her other property. This is recognized in all of the systems of Continental Europe. The codes do not contain express provisions with reference to such property. These are unnecessary under this system, as well as under the system of dowry. The general principle in both systems is that the economic interests of the woman are un-

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      17 Code, 1884, § 3343.
      18 Ibid., §§ 3335, 3336.

      19 Ibid., § 1729.
      20 Ibid., § 1757.

      21 Ibid., § 3344, seq.
      21 Ibid., §§ 3338-3341.
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28 Leuthold, R. R., p. 59; Lehr, Droit Russe, p. 42.

affected by the marriage, and hence, unless there is a positive exception, she possesses the right to receive and to hold her earnings as her separate property. The question of her personal right to engage in particular undertakings depends upon different considerations which have been previously considered. While the married woman may be limited in her right to engage in certain activities, she can not be deprived of the proceeds which result from an enterprise which she is permitted to undertake.

The English common law principle that the husband is entitled to all that which his wife gains by her personal activity, probably had its chief basis in the fact that he had an absolute right to her personal property. It was also connected with his right to the services of the wife. When the courts came to construe the married women's acts, they followed the strict rule of interpretation of statutes in derogation of the common law, and held that the provisions that the property of the wife should be held to her separate use, did not deprive the husband of his right to the latter's earnings. It was argued that his right to his wife's services was not affected by the property acts, and hence he continued to possess his right to the proceeds of her personal activity.

Where the statutes have expressly abrogated the common law effects of the marriage upon the property of the wife, or have declared that all of the property of the married woman, however acquired, shall be her separate estate,³ it would appear that the wife's earnings would become her separate property. Most of the states have placed the matter be-

¹ Bridel, Femme mariée, p. 4; Guntzberger, pp. 92, 96, 97; Pascaud, "Le Droit de la Femme mariée aux Produits de son Travail," Rev. pol. et parle, vol. ix, pp. 570, 571.

² Ante, § 6.

⁸ See ante, § 38, and cf. statutory provisions, post, Appendix.

yond question by positive statutory provisions giving the wife the sole right to the products of her personal industry. A qualification generally exists however that she shall not be entitled to compensation for services rendered to her husband or family.⁴ In a few of the states, the provision is that the wife's earnings shall not be liable for the debts of her husband.⁵

§ 40. Dower and Curtesy.

The widow's dower and the husband's curtesy are peculiar creations of the English common law. Representing at once elements of matrimonial property relationships and rights of succession, they indicate the intimate connection existing between these legal relations. These institutions continued for many centuries as essential features of the legal property relations of husband and wife. During the nineteenth century, however, they have suffered considerable modification in some legislations, and in others they have been entirely abrogated.

⁴Ala., Code, 1896, § 2531; Ark., Dig. Stat., 1894, § 4945; Conn., G. S., 1888 § 2790, 2796; Del., R. C., 1893, c. 76, § 3; Fla., R. S., 1892, § 2075; Ill., An. Stat., 1885, c. 68, ¶ 8; Ind., An. St., 1894, § 6975; Iowa, Code, 1897, § 3162; Me., R. S., 1883, c. 61, § 3; Mass., P. S., 1882, c. 147, § 4; Minn., G. S., 1894, § 5531; Miss., An. Code, 1882, § 2293; Mo., R. S., 1899, § 4340; Mont., C. C., 1895, § 225; Neb., C. S., 1891, § 1414; N. H., P. S., 1891, c. 176, § 1; N. J., Act, Mch. 27, 1874, § 4, Rev., 1877, p. 637; N. Y., Laws, 1896, c. 272, § 21; Oreg., An. St., 1887, § 2993; S. C., C. S. L., 1893, § 2165; Utah, R. S., 1898, § 1201; Vt., Stat., 1894, § 2647, Acts, 1888, p. 98; Va., Code, 1887, § 2287; W. Va., Code, 1891, c. 66, § 12 as enacted by Acts, 1893, c. iii; Wis., An. St., 1889, § 2343; Wy., R. S., 1887, § 1562; Dist. of Col., Act, June 1, 1896, § 3, U. S. Stat. at Large, vol. 29, p. 193; Hawaii, Laws, 1888, c. xi, § 3; England and Ireland, Act, 33 and 34 Vict., c. 93, § 1, Act, 45 and 46 Vict., c. 75, § 2; Scotland, Act, 40 and 41 Vict., c. 29, § 3.

⁵ N. D., R. C., 1895, § 2770; Oklah., R. S., 1893, § 2972; R. I., G. S., 1896, c. 255, § 5; S. D., C. L., 1887, § 2594. *Cf.* rule in American community systems, ante, § 18.



¹ Cf. post, § 45.

² See rhetorical soliloquy of an old lawyer occasioned by the abolition of dower and curtesy in Mississippi in 1880, *post*, Appendix, note F.

With the development of real estate transactions, it was inevitable that such provisions should prove inconvenient and that hardships, and even injustice, should frequently occur. It was natural that a demand should be made for a modification of the rules governing the wife's interest in the husband's lands. Thus, in England, in 1833, it was enacted that "no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will."3 Moreover, a simple declaration in the husband's will is sufficient to bar the widow from any dower in his lands of which he dies intestate.4 The widow's dower is also made secondary to all interests or charges created by any disposition of the husband to which his land is subject, including simple debts, as well as formal encumbrances.⁵ These profound breaches in the old system were part of a general movement 6 to relieve the alienation of land of the obstacles and cumbersome procedure of the common law.7 That it was not primarily intended to deprive the wife of any interest in her husband's lands is indicated by the fact that the act extended her dower right to trust estates and mere rights of entry.8

In the United States the legislation has been influenced not only by the same considerations, but also by the effects of the married women's acts. The latter, by taking away the husband's interest in his wife's property, removed a condition which many believed was the justification for the exist-

⁸ Act, 3 and 4 Wm. IV., c. 105, § 4.

⁴ Ibid., § 7.

⁵ Ibid., § 5.

⁶The husband's curtesy was not affected by the above act, but marriage settlements in England have to a great extent caused its disappearance. Schouler, H. & W., § 423.

⁷ An act, of the same session, which abolished fines and recoveries, provided a method for alienating the lands of a married woman. Act, 3 and 4 Wm. IV., c. 74, § 77 seq.; cf. post, § 42.

⁸ Act, 3 and 4 Wm. IV., c. 105, §§ 2, 3.

ence of dower. Here, also, the states have failed to follow a uniform policy. Some have been more strongly influenced by the one motive than by the other, and different methods have been adopted for realizing the desired end. Thus, some legislations have entirely abolished dower and curtesy, while in others the dower has been continued but made to apply equally to the husband and to the wife. Some states have abolished dower and curtesy but have instituted in their stead other estates generally more extensive in scope. In a few cases the interest has been limited to a legal or intestate portion in the succession, by being confined to the real property of which the party died seized.

⁹Cal., C. C., § 173; Col., An. St., 1891, § 1524; Conn., G. S., 1888, § 2796; Idaho, R. S., 1887, § 2506; Miss., An. Code, 1892, § 2291; Nev., G. S., 1885, § 505; N. D., R. C., 1895, §§ 2770, 3743; Oklah., R. S., 1893, § 6262, probably inoperative so far as dower is concerned, cf. Act, Mch. 3, 1887, § 18, U. S. Stat. at Large, vol. 24, pp. 638, 639; S. D., C. L., 1887, § 5 2594, 3402; Wash., G. S., 1891, § 1405; Wy., R. S., 1887, § 2221. Neither dower nor curtesy obtains in Louisiana or Texas.

19 Ill., An. St., 1885, c. 41, ¶ 1; Ky., Stat., 1894, § 2132; Me., but husband's interest is dependent upon solvency of wife's estate, R. S., 1883, c. 103, §§ 1, 14; Md., Laws, 1898, c. 457, §§ 6, 7; Ohio, R. S., 1891, § 4188; Oreg., wife's dower is increased to life interest in one-half of husband's lands and husband's curtesy attaches even if marriage is without issue, Statute, Feb. 22, 1883, Acts, p. 194, An. St., 1887, § 2983.

11 In all real property, of which decedent was seized during coverture, to the conveyance of which the survivor has not consented: ½ in fee simple: Ind., as against creditors, wife takes only ½ or 1/6 if the property exceeds \$10,000 or \$20,000 respectively (An. St., 1894, §\$ 2639, 2640, 2652, 6961), while husband's interest is subject to wife's ante-nuptial debts (*Ibid.*, \$2642); Iowa, Code, 1897, §\$ 3366, 3376; Minn., subject to debts which are not satisfied out of personal estate, G. S., 1894, § 4471; Neb., G. S., 1891, § 1124; ½ in fee simple: Kans., except in that sold at public auction or necessary for the payment of debts, G. S., 1889, §\$ 2599, 2619.

11 Dower: Geo., Code, 1895, § 4687; N. H., P. S., 1891, c. 195, § 3; Tenn., Code, 1884, §§ 3244 seq., 3251; Vermont, ½ in fee simple, Pub. Acts, 1896, no. 44, §§ 1, 2. Curtesy: Ark., Dig. Stat., 1894, § 4945, Neely v. Lancaster, 47, Ark. 175; Vt., ½ in fee simple, but limited to property of which both husband and wife are seized in her right, Pub. Acts, 1896, no. 44, § 15; Wis., does not attach if issue of wife by former marriage exists, An. St., 1889, § 2180.

In a number of states the statutory provisions recognize the widow's dower alone.¹³ The husband's common law curtesy exists in these states,¹⁴ except where it has been expressly or impliedly abrogated or modified.¹⁵ There are, finally, a few states that define dower and curtesy substantially as they existed at common law.¹⁶

Where the common law dower or curtesy obtains, or where the interest of one party extends to all of the lands of which the other was seized during the marriage, every conveyance or disposition of the property will be subject to such interest unless the party entitled participates in the act or his interest is barred by the acceptance of a pecuniary

18 Ala., subject to reduction in proportion to wife's separate estate, Code, 1896, §§ 1500, 1508; Ark., Dig. Stat., 1894, §2520, see preceding note for rule as to curtesy; Fla., R. S., 1892, §1830; Mont., C. C., 1895, §228; N. Y., Laws, 1896, c. 547, §170 seq.; S. C., C. S. L., 1893, §1900 seq.; Utah, dower and curtesy are abolished, but wife is given substantially the same, except that she takes ½ in fee simple, R. S., 1898, §§ 2826, 2832; Wis., An. St., 1889, §2159, see preceding note for rule respecting curtesy; Dist. of Col., Act, June 1, 1896, § 10, U. S. Stat. at Large, vol. 29, p. 193. By the Edmunds-Tucker Act of Mch. 3, 1887 (§ 18, U. S. Stat. at Large, vol. 24, pp. 638, 639), the widow's common law dower was established for the territories of the United States. Thus, it would appear that the widow can claim this right independent of the acts of the territorial legislature.

¹⁶ It is recognized by positive provisions in some states that have modified the widow's dower. *Cf. N. H.*, P. S., 1891, c. 195, § 9; Penn., even if marriage is without issue, Dig., 1883, p. 930, §4; Tenn., Code, 1884, § 3351.

¹⁸ It has been abrogated in Ariz., R. S., 1887, § 225; Geo., Code, 1895, § 3094; Mont., C. C., 1895, § 257; S. C., C. S. L., 1893, §2169; *cf.* Me., R. S., 1883, c. 61. § 2.

¹⁶ Del., R. C., 1893, c. 87, § 1, c. 85, § 1, c. 76, Act, Apl. 9, 1873, § 5; Mass., P. S., 1882, c. 124, §§ 1, 2, if no issue, the husband has life estate in one-half of wife's lands, Acts, 1885, c. 255, § 2; Mich., An. St., 1882, §§ 5733, 5783, it appears that husband's curtesy will not attach to wife's separate estate (*ibid.*, §6295), and in no case if wife has issue by a former marriage (*ibid.*, § 5770); Mo., R. S., 1899, §§ 2933, 111; N. J., Rev., 1877, p. 298, § 6, p. 320, § 1; R. I., G. L., 1896, c. 194, § 9, c. 203, § 12, c. 264, § 1; N. C., Code, 1883, §§ 2102, 2103, 1838; Va., Code, 1887, §§ 2267, 2286; W. Va., Code, 1891, c. 65, § 1. Husband has curtesy even if marriage is without issue, *ibid.*, § 15.

provision expressly or impliedly made in lieu thereof. Where the survivor is granted an intestate right of succession or a legal portion in real property, the acceptance of such interest will generally bar any claim to dower or curtesy.¹⁷

§ 41. Homestead.

In American states, the homestead and exemption laws have created for married persons common interests in their respective properties. The primary purpose of such statutes has been to provide for the support of the family in the event of the insolvency of its head. They provide for the exemption of the homestead from execution, the maximum amount of land and the value of the same varying in the different states. Personal property of a certain character and value is also generally exempted from execution for the debts of the owner. In order to secure such property for the future needs of the family and to prevent the husband from sacrificing the same, it is very generally provided that no disposition of the homestead or mortgage of the exempt personal property shall be valid without the joinder of the wife in the deed.

As an interesting result of the married women's acts, the wife, in many states, is permitted to select a homestead and to hold certain personal property exempt from execution by her creditors. In some states this results from express statutory provisions, while in others the enactment that

¹⁷ Cf. post, §§ 46, 47. The conduct of the party may also lead to barring of such interest.

¹ Geo., if wife with minor child lives separate from husband, Code, 1895, § 2842; Ind. An. St., 1894, § 6969; Iowa, Code, 1897, § 2978; Md., Laws, 1898, c. 355; Mich., An. St., 1882, §§ 7728, 7729; Miss., An. Code, 1892, §§ 1970, 1984; Mo. R. S., 1899, § 4335; Mont. C. C., 1895, § 1671; N. H., P. S., 1891, c. 138, § 1; N. Y., C. C. P., §§ 1392, 1397; Ohio, R. S., 1891, § 5435; Oklah., Laws, 1897, c. 8, § 5; Oreg., Laws, 1893, p. 93; N. D., R. C., 1895, §§ 3606,

owners or householders are entitled to the privilege would seem to include married women.² In the later statutes, it is generally provided that husband and wife shall not both be permitted to claim such exemptions.

The provisions limiting the disposition of the homestead do not apply equally to the husband and the wife. Most of the acts were framed in the expectation that the exempted property would be selected from that belonging to the husband. The provision that no disposition of the homestead shall be valid without the consent of the wife does not limit her disposition of the same where it has been selected from her own property. There is, however, a distinct tendency to require the consent of each married party to every disposition affecting the title of a homestead claimed by or selected out of the property of the other. The homestead thus becomes a species of common property and the rules of succession emphasize this character.³

§ 42. Administration of the Wife's Property.

The general rule, recognized in all of the legislations, is that the wife alone is competent and qualified to perform all acts of simple administration over her separate property. In

3621; S. C., C. S. L., 1893, § 2132; S. D., C. L., 1887, §2456, seq.; Utah, R. S., 1898, §§ 1149, 1152, 1154; Wash., Laws, 1895, c. 64; W. Va., Code, 1891, c. 41, §§ 23, 30; Dist. of Col., Act, June 1, 1896, § 5, U. S. Stat. at Large, vol. 29, p. 193; cf. La. Const., 1898, art. 244. In following, husband must join wife in making claim to homestead out of her separate property: Ariz., R. S., 1887, § 2074; Cal. C. C., §§ 1238, 1239; Idaho, R. S., 1887, §§ 3036, 3037; Nev., G. S., 1885, § 539.

² Ala., Const., art. x, § 2; Conn. G. S., 1888, §2783; Ill., An. St., 1885, c. 52, ¶ 1; Kans., Const., art. 15, § 9; Ky., Stat., 1894, § 1702; Me., R. S., 1883, c. 81, §§ 63-66; Mass., P. S., 1882, c. 123, § 1; Minn., G. S., 1894, § 5521; N. J., Rev., 1877, p. 1055, § 1; N. C., Const., art. x, § 2; Vt. Stat., 1894, § 2179; Va., Code, 1887, §§ 3630, 3650-3652; Wis., An. St., 1889, § 2983; Wy., R. S., 1887, § 2780.

⁸ Cf. post, § 48.

this respect she acts as a femme sole.¹ The husband does not have a right to such administration. It is, nevertheless, recognized by some of the statutes that the marriage establishes such an intimate relation between the parties as to justify the presumption that the wife has entrusted the husband with the administration of her goods,² and where, as a matter of fact, she permits her husband to exercise such functions over her property, she will not be able, in the absence of an express agreement, to hold him accountable for the expenditure which he has made of the fruits and profits resulting from his administration.³

With respect to administration in the broader sense, including the right of encumbering and alienating the separate property, there is not such general agreement. As an aid in determining this question it will be well to refer to the general attitude of the legislations respecting the contractual capacity of married women. In those that accept the principle that the wife has the same general capacity to make contracts as is possessed by the unmarried woman, she will have the power to dispose of her separate property unless special provisions to the contrary exist. On the other hand, according to the legislations that regard the marriage as qualifying the general contractual capacity of the woman, the wife will have the right to make only such dispositions of her property as are within the scope of her granted powers.

^{&#}x27;Contra in Texas, where the husband has the sole management of the property and wife has only a limited right of administration, R. S., 1895, §§ 2967, 2970, 2971; cf. rule in Florida and Tennessee, ante, § 38, note 13, seq.

³ Austria, B. G., § 1238; only as regards paraphernalia under system of dowry: France, C. C., 1578; Italy, C. C., 1429; La. C. C., 2385. *Contra*, Spain, C. C., 1383, 1384; Basle, Stat., Mch. 10, 1884, art. 30.

³ Austria, B. G., § 1293; Germany, B. G., § 1430; France, C. C., 1539, 1578; Italy, C. C., 1429; La., C. C., 2386; Switz., Vorentwurf, 271.

⁴ See ante, § 2

On this question, the legislations divide themselves into three classes:

- I. Where the wife has the general right of disposition over all her separate property. This is subject, of course, to particular provisions governing dispositions between husband and wife, contracts of surety, donations, etc.⁵
- II. Where the married woman is limited in the disposition of her immovables.
- III. Where the wife is restricted in the disposition of her property in general.

The first class includes those states that have continued the rule of Roman law, as well as a majority of the newer legislations. Most of them recognize that the general contractual capacity of the woman is unaffected by the marriage, and hence particular provisions are unnecessary.⁶

Most of the American states that are not included in the first group, constitute the second division, which limits the married woman in dispositions affecting her real property. The peculiar sanctity which feudal ideas conferred upon land and the desire to preserve such property for the family have influenced these restrictions. It is necessary to note that the existing limitations were primarily designed to facilitate rather than to restrict the conveyance of the wife's real property. At common law such property was regarded as inalienable whether the husband acted alone or jointly

⁵ Cf. ante, §§ 3-5.

⁶The following are included (cf. references, ante, §§ 2, 3): Austria, Germany, Prussia (but consent of husband is necessary for contracts of sale or pledge of jewelry or articles of adornment, A. L. R., ii, 1, § 223), Saxony, Russia, Norway, Basle, Glaris, Lucerne, Zürich, Draft Code of Switzerland, England, Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New York, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Virginia, Washington, Wisconsin, Wyoming, District of Columbia, Hawaii.

with his wife. The procedure which was devised to evade such restriction, was cumbersome in its operation and was abrogated as a result of the general movement to abolish antiquated obstacles to the transfer of land.⁷ The joinder of the husband and wife in the deed of conveyance, executed with more or less formality, came to be sufficient to pass the title of the wife's real property.⁸ With the barring of the husband's interest in the wife's lands and the conferring of general contractual capacity upon the married woman, the tendency has appeared to remove the remaining restrictions.⁹

The general rule that the joinder of the husband and wife is necessary to a valid conveyance of her real property still obtains in a number of states.¹⁰ The provision intended to protect the wife from undue influence by requiring her separate examination respecting the voluntary character of the act, is also retained in a few statutes.¹¹ The protection of

¹ Cf. ante, § 40.

⁸Act, 3 & 4 Wm. IV., c. 74, § 77 seq. Custom and statutes in American states introduced similar rules.

^{*}Recent abrogations have been made in: Ala., cf. Code, 1886, § 2346, with Code, 1896, § 2526; Ark., the courts having decided that wife could not make executory contracts to convey land (Christman v. Partee, 38 Ark., 31; Walters v. Wagley, 53 Ark., 509), an act of 1895 gave her this power (Laws, p. 58); Cal., Stat. & Amend., 1891, p. 137, ibid., 1895, p. 53; Md. cf. P. G. L., 1888, art. 45, § 2, with Laws, 1898, c. 457, §§ 4, 5.

¹⁶ Fla., R. S., 1892, § 1956; Idaho, R. S., 1887, § 2922; Ind., An. Stat., 1894, § 6961; Ky., Stat., 1894, § 2128; Minn., G. S., 1894, § 5530, 5532; Mo., R. S., 1899, § 901; Nev., G. S., 1885, §§ 2570, 2588 seq.; N. H., P. S., 1891, c. 176, § 3; N. J., Act, Mch. 27, 1874, § 14, Rev., 1877, p. 637; N. M., C. L., 1897, § 1510; N. C., Code, 1883, §§ 1826, 1834; Penn., Act, June 8, 1893, §§ 1, 2, Laws, p. 344; Tenn., Code, 1884, §§ 3338-3340; Vt., Stat., 1884, § 2646; W. Va., Acts, 1893, c. iii, §§ 2, 3; cf. Texas, R. S., 1895, art. 635.

¹¹ Idaho, R. S., 1887, §§ 2922, 2956, 2960; Ky., Stat., 1894, § 507; N. C., Code, 1883, §§ 1834, 1246, 1256; Tenn., Code, 1884, § 3340; cf. La., C. C., 127, 128; Texas, R. S., 1895, arts. 635, 4618, 4621.

the husband's curtesy appears to be the chief reason for the retention of the restriction in the other legislations.¹³

The third class includes legislations in which the system of separate property is regarded as unusual, and in which the married woman is generally restricted in her contractual capacity. The chief representatives of this class are the French Civil Code and those Codes that have been most strongly influenced by it. The provisions of the codes are somewhat obscure and, in some instances, conflict with each other. The starting point is the general provision that the wife, even if living under the separate property system, can not acquire or alienate property without the consent or joinder of her husband.¹³ This principle is adhered to so far as separate property (paraphernalia) under the system of dowry is concerned. The wife has the management, but is restricted in dispositions over the substance of the goods.¹⁴

A distinction is made respecting the system of separate property, according as it is the result of a judicial separation or of a marriage contract. In the former case, it is expressly provided that the wife may dispose of her movables and alienate the same.¹⁶ In the case of contractual separate

18 Wherever the common law right of curtesy exists, any disposition by the wife, even if she possesses the general right of alienating her real property, will be subject to the conditional estate of the husband, cf. ante, § 40.

¹³ France, C. C., 217; La., C. C., 122; cf. Finland, Stat., Apl. 15, 1889, c. ii, art. 6. In Spain the limitation is general, but does not contain the specific reference to the system of separate property, C. C., 61. The Italian code does not contain the specific reference to the system of separate property, and is limited to alienation or mortgage of immovables, contracting of loans and assignment or recovery of stocks, C. C., 134.

¹⁶ France, C. C., 1576; Spain, C. C., 1344, 1387; La., C. C., 2384, 2390; cf. Italy, C. C., 1427, 134.

¹⁵ France, C. C., 1449; La., C. C., 2435; in Spain the wife has the same power over her property as the husband when he administers her goods, but she cannot alienate or engage her immovables without judicial anthorization, C. C., 1442, 1444; in Finland she may dispose of her property as a widow, Stat., Apl. 15, 1889, c. v, art. 15.

property, the codes are silent respecting the alienability of movables, but contain provisions expressly prohibiting the alienation of immovables without proper authorization.¹⁶ It has been argued that the fact that emphasis is placed upon the prohibition of the alienation of immovables must be taken as evidence that the alienation of movables is permitted, as under the system of judicial separate property. This seems to be the prevailing view the positive statements of the general provision limiting the powers of the wife.¹⁸

§ 43. Support of the Family.

The equitable character of a matrimonial property system will be affected by the provision that is made for the liquidation of the charges of the conjugal society. In all of the systems previously considered, the chief justification for the privileges which the husband possesses in his wife's property is to be found in the fact that he supports the expenses of the family household. Under the system of separate property, the husband is not entitled to any gain from the property of the wife. Moreover, the increasing extent to which women are engaging in industrial and other pursuits, tends to decrease the economic value of the personal services which the wife renders the family. The interests of third parties are likewise concerned. Where the husband becomes incapable of sustaining the matrimonial charges, shall creditors who have furnished supplies for the family suffer losses, while the wife, who has contributed to the expenses

¹⁶ France, C. C., 1538; La., C. C., 2397; in Spain, it would appear that the same rule obtains as where the system is the result of judicial decrees, cf. C. C., 1432, 1442, 1444.

¹⁷ Cf. Guntzberger, pp. 105, 98, 99. Respecting the tendency to apply the same rule to movables of the paraphernalia, see *ibid.*, p. 93 seq.

¹⁸ Cf. ante, note 13.

for which the debts have been incurred, possesses ample means for liquidating such obligations?

Many states recognize that equitable considerations demand that the wife, who is able, shall assist in bearing the burden of the family expenses. In some cases the principle of joint liability has been adopted, the expenses of the family being chargeable upon the property of the husband and wife or of either of them. Other legislations make the wife only secondarily liable, postponing execution upon her property until the failure of the husband's property to satisfy the debts, or granting her a right of indemnification against her husband.2

The legislations of Continental Europe generally require the wife to make a contribution out of the income of her property and the proceeds of her labor. In some cases it is provided that the contributions shall be suitable, or in proportion to the resources of the two parties,3 while in other instances, a definite proportion of her income is required.4 Particular provisions exist for the case where the system of

¹Col., Act, Apl. 6, 1891, Laws, p. 238; Ill. An. St., 1885, c. 68, ¶ 15; Iowa, Code, 1897, § 3165; Mo., wife's separate personal property is liable for debts for necessaries, R. S., 1899, § 4340; N. M., if for necessaries, C. L., 1897, § 1511; Oreg., An. St., 1887, § 2874; Utah R. S., 1898, § 1206; Wash., G. S., 1891, § 1414.

² Ariz., where wife contracts debts upon her husband's credit, R. S., 1887, §§ 2107, 2108; Conn., G. S., 1888, § 2797; Neb., C. S., 1891, § 1411; Penn., Dig., 1883, p. 1151, § 15; cf. Mont., C. C., 1895, § 212; for maintenance of children: England, Act, 33 & 34 Vict., c. 93, § 14; Act, 45 & 46 Vict., c. 75, § 21; Leuthold, R. R., p. 68; cf. Idado, R. S., 1887, § 5859; Nev. G. S., 1885, § 537.

⁸ Germany, B. G., § 1427; Italy, C. C., 1426, 138; Spain, C. C., 1434; Switz., Vorentwurf, 274.

France, 1/3, C. C., 1537, 1575; La., 1/2, C. C., 2388, 2395; Basle, 1/2 and if husband is incapable, all, Stat., Mch. 19, 1884, art. 31; in Spain the profits of paraphernal property are employed in defraying the matrimonial charges and the substance may be taken in case the dowry and the husband's property are insufficient, C. C., 1385.

separate property is the result of judicial decree. The contribution, in such event, must generally be in proportion to the resources of the two parties, and may affect the substance of the wife's property as well as her income.⁵

The married woman may indirectly be compelled to bear a portion of the family expense even in those states which do not impose upon her a general obligation to sustain such charges. It is a general rule that the minor children have a right of demanding maintenance from the mother as well as from the father, though the former's liability is in most cases secondary to that of the latter.

There has been no such unanimity in granting the husband a right of demanding the necessary aliments from his wife. Most of the legislations, particularly in England and America, have rules for enforcing the husband's obligation to support the wife. The provisions may lead to the placing of the husband's property in the hands of trustees. They include criminal as well as civil penalties. Many of the acts date back to the period in which the economic interests of the married woman were entirely in the control of the husband.

The English common law recognized no obligation on the part of the wife to support her husband out of her property. Such a provision would have been redundant under the old system. The husband was entitled to the substance of the wife's personal property and to the profits of her real estate. The law likewise secured him the privilege of controlling his wife's services and of collecting the proceeds

⁵ France, C. C., 1448; Italy, C. C., 1423; Spain, C. C., 1434; La., C. C., 2434; Finland, Stat., Apl. 15, 1889, c. v, § 16; Basle, court determines the amount, Stat., Mch. 10, 1884, art. 41; Lucerne, restricted to income, Stat., Nov. 26, 1880, art. 22; cf. Prussia, A. L. R., ii. 1, § 262.

⁶ It is possible in some states for a wealthy wife to obtain a divorce on the ground of lack of support.

arising from her labor. Aside from the substance of the wife's realty, the husband had absolute right to all of his wife's property. To-day, the husband is deprived of these extensive privileges, and is left with practically no legal rights of economic value as regards his wife or her property. His right to her services can no longer be enforced against her will.

Some of the Continental codes require the married woman to support her husband if his means are insufficient, and similar provisions were incorporated in the English Married Women's Property Acts of 1870 and 1882.8 The American states have been slow to accept this principle. Only a few legislations contain positive provisions making the wife liable for the support of her husband, and in all cases the husband's incapacity to support himself must be due to infirmity. In a few cases the husband is given privileges in his wife's property in case she has abandoned him.10

Some evidence of a tendency to place the husband and wife upon a condition of equality with respect to obligations for support is to be found in the newer legislation regarding the effects of divorce. No part of the law regulating family relations in the United States is in such a chaotic state as that which provides for the judicial dissolution of the marriage and the effects of such dissolution. Statutory provisions in the respective states display a great lack of uniformity, and

⁷Germany, B. G., § 1360; Saxony, B. G., § 1637; Italy, C. C., 132; Spain, C. C., 143, 144; cf. Prussia, A. L. R., ii. 1, §262. In some of the states there is a general provision requiring married parties to render mutual assistance; France, C. C., 219; Prussia, A. L. R. ii. I, § 174; Leuthold, R. R., p. 59.

⁸ Act, 33 & 34 Vict., c. 93, § 13; Act, 45 & 46 Vict., c. 75, § 20.

⁹Cal., C. C., 176; Idaho, R. S. 1887, § 2507; Mont., C. C., 1895, § 246; Nev., G. S., 1885, § 522.

¹⁰ Iowa, Code, 1897, §§ 2220, 3158; Oklah., R. S., 1893, § 2975; Penn., Dig., 1883, p. 1348, §§ 51-55; Utah, R. S., 1898, § 1220.

in many cases are illogical and inequitable in character. This condition is due not only to the great extension of the grounds for divorce, but also to changes which have been effected in the matrimonial property relations.

Under the old system, alimony existed for the wife, generally without regard to the question of her innocence or guilt. Moreover, if the husband was the guilty party, he was required to restore the wife's property at once, while the wife retained her dower in his lands. If the husband obtained the divorce, he retained all or a portion of the property of the wife, while the latter lost all her rights in her husband's property. In all cases the husband was liable for the support and maintenance of the common children.

With the development of the separate property of the wife these provisions assumed an inequitable character. An innocent husband might be compelled to pay alimony, including the expenses of defending the suit for divorce, to a guilty wife possessed of independent means, while, on the other hand, he had ceased to possess property of the wife which he might use to assist him in defraying the expenses of the maintenance of the children and of the common household.

The states have not adopted the same methods for ameliorating this condition. In some, statutory provisions have made the wife, equally with the husband, liable for the maintenance of the minor children, while in others such liability of the wife will attach only where she has been ad-

¹¹ Conn., G. S., 1888, § 2812; Ind., An. St., 1894, § 1058; Ky., Stat., 1894, § 2123; Me., R. S., 1883, c. 59, § 17; Minn., G. S., 1894, §§ 4801-4803; Miss., An. Code, 1892, § 1565; Mo., R. S., 1899, § 2926; Mont., C. C., 1895, § 191; Neb., C. S., 1891, § 1432; N. J., Rev., 1877, p. 317, § 19; N. D., R. C., 1895, § 2759; Ohio, R. S., 1891, § 5701, as amended by Statute, May 19, 1894, Acts, p. 348; S. D., C. L., 1887, § 2582; Utah, R. S., 1898, § 1212; Va., Code, 1887, § 2263; W. Va., Code, 1891, c. 64, § 11; Hawaii, C. L., 1884, §§ 1328, 1329; cf. Ariz., R. S., 1887, § 2114.

judged the guilty party.¹² A few statutes provide that the separate estate of the wife shall be taken into consideration, and that alimony may be refused if she has sufficient property for her needs.¹³

Quite a number of the states have accepted the principle of equal rights for both parties. There is a general provision that alimony may be granted to the innocent party, or the court is authorized to make such disposition of the property of the parties as under the circumstances will be just and equitable.¹⁴ This is the position of the European legislations.¹⁵

A tendency has appeared in the newer legislations to limit the amount which either party may receive to an alimentary pension payable only so long as it may be needed. This is generally coupled with a proviso that the guilty party shall restore, while the innocent party shall retain, all economic benefits gained as a result of the marriage.

¹⁸ Kans., G. S., 1889, § 4756; Mass., P. S., 1882, c. 146, § 27; N. H., P. S., 1891, c. 175, § 13; Oklah., R. S., 1893, § 4550; Oreg., An. St., 1887, § 501; Wis., An. St., 1889, § 2365; cf. England, Act, 20 and 21 Vict., c. 85, § 45.

¹⁸ Ala., Code, 1896, § 1495; Cal., C. C., 142; Geo., Code, 1895, § 2458; Idaho, R. S., 1887, § 2477; Mont., C. C., 1895, § 195; Tenn., Code, 1884, § 3326.

14 Iowa, Code, 1897, §§ 3177-3180; Mass., P. S., 1882, c. 146, § 15; Nev., G. S., 1585, § 494; N. C., Code, 1883, § 1290; Ohio, R. S., 1891, §§ 5690-5701, as amended by Statute, Feb. 9, 1893, Acts, p. 30, and Statute May 19, 1894, Acts, p. 348; Oreg., An. St., 1887, § 501; R. I., G. L., 1896, c. 195, § 8; Vt., Stat., 1894, § 2694; Va., Code, 1887, § 2263; Wash., C. P., 1891, § 771; W. Va., Code, 1891, c. 64, § 11; England, Act, 20 and 21 Vict., c. 85, § 45; cf. Ariz., R. S., 1887, § 2114; Cal., C. C., 146; Idaho, R. S., 1887, § 2480; Ill., An. St., 1885, c. 68, ¶ 5.

15 Germany, B. G., §§ 1578-1585; Prussia, A. L. R., U., I, §§ 783 seq., 809 seq.; Saxony, B. G., §§ 1750, 1751; Austria, B. G., § 117; France, C. C., 299-301; Italy, C. C., 156; Spain, C. C., 73; Basle, Stat., Mch. 10, 1884, art. 23; Lucerne, Stat., Nov. 26, 1880, art. 25; Zürich, P. R. G., § 629 seq.; Switz., Vorentwurf, 170-172.

§ 44. Liability for Debts.

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Under the rules of the English common law, the husband was liable for his wife's ante-nuptial and post-nuptial obligations, including those arising from torts as well as those proceeding from contracts.¹ The married women's property acts have affected this liability and practically abrogated it. When the husband ceased to receive economic benefits from the wife as a necessary result of the marriage, one of the chief grounds justifying his responsibility for her obligations disappeared.

The husband's liability did not rest alone upon the fact that he received property from the wife. He was liable even if he received nothing, while, on the other hand, his liability ceased at her death even if he had received all of her property. At the same time, it is beyond question that the chief explanation of the husband's release from such liability is to be found in the fact that the law does not accord him any right to his wife's property.

Another influence has grown out of the change in the legal economic position of the married woman. To-day the wife possesses property which, even during coverture, is liable to execution for the payment of her debts.

Most of the legislations take the position that where separate property obtains, neither married party is responsible for the obligations of the other except where these have been contracted for necessaries for the support of the family, or in the sphere of an express or implied agency. In order to protect the wife's ante-nuptial creditors, a proviso has been introduced in some statutes making the husband liable to the extent of any property he may have received from the wife.

¹ For character and extent of this obligation, see Schouler, H. & W., Part iv, Chaps. ii, iii.

² Cf. ante, § 43.

^{*} England and Ireland, Act, 33 and 34 Victo, c. 93, \$ 12, bad provided an abso-

Particular provisions exist in some legislations respecting the obligations arising from the post-nuptial torts of the A few of the American states retain the husband's common law liability,4 but the majority of the legislations do not recognize any resposibility on the part of the husband except where the act was done under his coercion or authorization or where he would be jointly liable if the marriage did not exist.5

lute exemption. This was repealed by Act, 37 and 38 Vict., c. 50, which introduced above rule; as between husband and wife her separate property is primarily liable, 45 and 46 Vict., c. 75, §§ 13-15; Scotland, Act, 40 and 41 Vict., c. 29, § 4; Ky., Stat., 1894, §2130; Col., An. St., 1891, § 3014; Geo., Code, 1895, § 2473; Ind., An, St., 1894, § 6970; Mo., R. S., 1899, § 4341; N. Y., Laws, 1896, c. 272, § 24; W. Va., Code, c. 66, § 11, as enacted by Acts, 1893, c. iii.

Geo., Code, 1895, § 3817; N. M., C. L., § 1503; N. C., Code, 1883, § 1833; Wy., R. S., 1887, § 1565; of. Del., R. C., 1893, c. 76, p. 600.

⁵ Ala., Code, 1896, § 2525; Conn., G. S., 1888, § 984; Ill., An. St., 1885, c. 68, ¶ 4; Ind., An. St., 1894, §§ 6965, 6966; Iowa, Code, 1897, §§ 3151, 3156; Ky., Stat., 1894, § 2120; Me., R. S., 1884, c. 61, § 4; Md., Laws, 1898, c. 457, § 5; Mich., An. St., 1882, § 7714; Minn., Laws, 1897, c. 10; Mont., C. C., 1895, §§ 218, 226, 254; N. Y., Laws, 1896, c. 273, § 27; N. D., R. C., 1895, § 2770; Ohio, R. S., 1891, § 3115; Oklah., R. S. 1893, § 2972; Oreg., An. St., 1887, § 2996; R. I., G. L., 1896, c. 194, § 14; S. D., C. L., 1887, §2594; Utah, R. S., 1898, § 1204; Vt., Stat., 1894, §2648; Wash., G. S., 1891, § 1413; Wis., An. St., 1889, § 2969; Hawaii, Laws, 1888, c. xi, § 7; England, Act, 45 and 46, Vict., c. 75, §§ 1, 14, 24.

PART III.

SUCCESSION OF MARRIED PARTIES.

§ 45. General Relation to Matrimonial Property Rights.

Any general comparison of matrimonial property systems will be incomplete without a consideration of the mutual rights of inheritance of married parties. The converse is equally true. An examination of the provisions governing the succession of married parties reveals the greatest divergence among the various legislations, and it would be impossible to explain the differences without reference to the property relations of the parties during the marriage.

The history of the law of succession of married parties in a particular legislation often illustrates this close relationship. Thus, in the early Roman law, the wife has the same right of succession as the children. In legal terms this is explained by the fact that she is one of the agnatic family, one of the sui heredes. Its moral basis, however, reveals itself in the fact that the husband, in the marriage with manus, receives all that the wife possesses or acquires in the same way as he obtains the acquisitions of his children, hence she is of right entitled to the same share in his succession as is accorded to a child.

The rule of succession was confined in its application to the civil law marriage with manus. The woman who did not come under the marital power was not recognized as a wife (mater familias) in the strict sense of the civil law, and she 155]

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could not claim the civil law rights which a wife possessed in the succession of her deceased husband. She did not become a member of his agnatic family.

The prætorian law, which introduced important modifications in the civil law of succession, did not accord any extensive privilege to the wife. The prætor brought about a development from the succession based upon agnatic or family organization to that resting upon cognate or blood relationship. The surviving married party, in so far as he did not possess a civil law right of succession, was postponed to all relatives of a degree capable of succeeding.

The explanation of this seeming harshness, in a legal system that was distinguished by its equitable character, is to be found in the fact that the relations of the husband and wife had, in general, come under the dotal system. wife's property did not pass, as a result of the marriage, into the ownership of the husband. The dos and the donatio propter nuptias generally furnished the wife adequate provision for the contingency of the husband's prior death. Moreover, under the prætorian system, she had a right of succession to the property of her father and cognatic relatives. The later imperial legislation made provision for a widow in indigent circumstances. She was granted a fourth part of the estate of her husband, but if the decedent left three or more children she was restricted to a child's share. If the children were common to both parties the share was held in usufruct. This interest was not subject to the testamentary disposition of the husband."

Teutonic law did not accord the wife a right of inheritance in the proper sense of the term.2 But, as a result of the marriage, she acquired certain economic interests from her

¹ Sohm, Inst., § 111.

² Heusler, Inst., vol. ii, p. 421, seq.

husband or rights in his property which were in the nature of provisions for the future dissolution of the marriage.³ In addition, where community of goods obtained, the widow received her share of the joint property or retained her rights in the community which was continued with the children (fortgesetzte Gütergemeinschaft). Where the marital administration and usufruct was the rule, the dotal property was returned to the widow as nearly as possible in the same condition as it existed at the time the husband received the same.

The English common law rules, while influenced by peculiar conditions, illustrate the same general principle. The wife is given no right of inheritance or claim to a distributive share in the estate of her deceased husband. But her dower right in the lands of her husband becomes consummate upon his death and she regains possession of her individual real property.

Modern systems of inheritance rest upon the principle of blood relationship. In all legislations, however, this general principle is modified by the recognition of an interest, great or small, of the surviving married party. This was the position which the Roman law was beginning to take at the time its development was checked. Modern legislations, in effect, recognize that the marriage establishes a bond between the parties similar to the ties of kinship. matrimonial property system contains adequate provision for the future of the survivor, the law of succession may disregard or but slightly emphasize such connection. other hand, if death immediately dissolves the matrimonial property relationships and leaves the survivor in the same economic position, so far as concerns the decedent, as at the beginning of the marriage, the law of inheritance will generally grant the former an interest in the latter's succession.

^{*} Widerlage, Witthum, Morgengabe. Cf. Heusler, Inst., vol. ii, pp. 370-376.

The modern legislation has also tended to place the married parties on a condition of equality in this matter. Provision is made for the surviving married party, and distinctions which were made according as the survivor was the husband or the wife, are gradually being eliminated. This interest may be a simple right of intestate succession, or it may be a legal portion which is not subject to testamentary disposition. The latter, moreover, may include only that which is necessary for subsistence, or it may extend to a distinct share in the succession of the decedent.

§ 46. Intestate Succession.

The French Civil Code was for a long period taken as the model by most of the states which recognized a community of property as the statutory system. This code originally postponed the surviving married party to all relatives of a degree capable of succeeding and to illegitimate children.² The theory was that the share of the survivor in the common property would constitute a sufficient provision, and he was not even accorded an alimentary pension.2 The freedom of contract, however, permitted the severe restriction of the principle of community as well as the establishment of an entirely different system. Thus, it was possible that the survivor who possessed no individual property would find himself in reduced and even necessitous circumstances in case the decedent died intestate or failed to make proper provision in his will.

In France, as early as 1872,3 an act was proposed which had for its object the extension of the successoral rights of

C. C., 767; relatives up to the twelfth degree are capable of succession, ibid., 755.

² Cf., post, § 48.

⁸ Viollet, Précis, p. 698, note 3.

the surviving married party.⁴ Nearly twenty years elapsed before the legislative sanction was finally obtained in a statute of March 9, 1891.⁵ The French legislature was influenced by the fact that other states whose legislations were based upon the Code Napoléon, had modified its provisions in the interests of the surviving spouse. The most recent instance of such legislation is the Belgian statute of November 20, 1896, which modifies Article 767 of the Civil Code in accordance with the same general principles that influenced the French act of 1891.⁶

As a rule, the interest of the survivor in the intestate succession of the deceased spouse is limited to a right of usufruct for life where issue or heir exists. If there are no heirs capable of succeeding, the surviving married party takes all in full ownership. The amount of the property covered by the usufruct will be affected by the number and degree of the existing heirs.⁷ The states in which the

⁴ Earlier statutes had granted the widow certain successoral rights in particular kinds of property: Right to dispose of artistic and literary products of decedent, Stat., Apl. 8, 1854, Bull. des lois, xi. sér., vol. 3, p. 869; Stat., July 14, 1866, art, 1, Bull. des lois, xi. sér., vol. 28, p. 61; widows of pensioned officials are in certain cases entitled to a continuation of a certain proportion of the pension, Stat., June 9, 1853, arts. 13, 14, Bull des lois, xi. sér., vol. 1, p. 989; Stat., Apl. 11, 1831, art. 19, Bull des lois, ix. sér., vol. 2, p. 166; Stat., Apl. 18, 1831, art. 19, Bull des lois, ix. sér., vol. 2, p. 239.

⁵ An. fran., vol. 11, p. 147 seq.; cf. An. êtran., vol. 4, p. 497, note 1.

⁶ An. ¿tran., vol. 26, p. 498 seq.

¹ France, ½, if issue exists, but not to exceed child's part if issue is of previous marriage; ½, if no issue exists (C. C., 767 as amended by Stat., Mch. 9, 1891, art. 1, An. fran., vol. 11, p. 147); Belgium, share of legitimate child if issue exists, but not to exceed ½ if issue is of previous marriage; ½, if no issue, but ascendants or brother or sister or their descendants; all, if only other collaterals exist (Stat., Nov. 20, 1896, § 1, An. étran., vol. 26, p. 498); Spain, legal portion of each child if issue exists; ½, if no issue, but ascendants; ½, in other cases (C. C., 834-837, 952); Geneva, ½, if legitimate issue exists; ½ in ownership, if no legitimate issue; ½ in ownership, if no descendants, father or mother or their descendants (C. C., 767 as amended by Stat., Sept. 5, 1874, An. étran., vol. 4, p.

system of dowry is the statutory regime, have adopted similar provisions for intestate succession.8

The provisions, at least so far as concerns community systems, where issue exists, are extensions of matrimonial property law rather than proper hereditary shares. The survivor is given, in addition to his share in the common property, a usufruct for life over a certain part of the shares falling to the issue of the marriage.10 Upon the death of the survivor, the descendants recover the usufruct of the property of which they have previously possessed only the title.

The states recognizing marital administration and usufruct as the statutory system do not follow this principle. In this system, the death of either party brings about an immediate dissolution of the matrimonial property relations, and the survivor does not retain any privileges in the property of the decedent. The law of succession, accordingly, supplements the matrimonial property law. The survivor is generally accorded an hereditary share in ownership even

499); Basle City, survivor postponed to relatives of fifth degree, but he has during minority of children the usufruct of their shares in the succession (Stat., Mch. 10, 1884, art. 48); Ita., common issue's heritable share of common property; intestate's share of community if no issue or ascendario exist (C. C., 915-917). The other American states that have introduced community of property provide a substantial right of intestate succession for the survivor (see below, note 19).

⁸ Austria, usufruct of child's share not to exceed 1/4; 1/4 in ownership, if no issue exists (B. G., §§ 757-759); Italy, usufruct of child's share, the survivor being counted in the number of children; 1/2 in ownership, if no legitimate issue, but natural children, ascendants, brother or sister or their descendants exist; if natural children and ascendants come together, the share is limited to 1/2; 3/4 in ownership, if none of foregoing, but relatives up to lixth degree exist (Q.C., 753-755).

⁹ Cf. community continued between survivor and common children, ante, § 23,

¹⁰ In European legislation, the surviving husband has a right of usufruct over the shares of minor children, and where, as in the German code, parental instead of paternal authority is established, the widow possesses such right. Cf. Motive, vol. 5, p. 368.

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where issue exists, though the extent of such share is generally affected by the number and degree of the existing relatives of the decedent."

The legislations which recognize separate property as the statutory system likewise accord a right of succession to the survivor of the marriage. In Russia, this is fixed at one-fourth of the movable and one-seventh of the immovable property of the decedent, and obtains without regard to the existence of issue of the marriage.¹²

In England and the United States, the determination of the hereditary rights of the surviving married party has been complicated by many conditions. The development of the new matrimonial property systems has not been perfected. Institutions that are the products of the earlier customs have, in many cases, been carried over, without modification, into the new system. Moreover, the distinction between the succession to real and personal property, which was empha-

11 Germany, 1/4, if descendants; 1/4, if no descendants, but parents, or their descendants, or grandparents; all, in other cases (B. G., § 1931; cf. § 1932); Prussia, child's part not to exceed 1/4; 1/3, if no descendants, but brother or sister or their children; 1/2, if none of foregoing, but other relatives up to sixth degree; all, in other cases (A. L. R., ii, 1, §§ 621-627; cf. §§ 628-630); Saxony, ¼, if descendants; 3/4, if no descendants, but adopted or natural children; 1/4, if none of foregoing, but brother or sister or their descendants, parents or grandparents; all, in other cases (B. G., §§ 2049-2053); Lucerne, 1/4, in usufruct, if descendants; 1/4, in ownership, if only heirs of second class; 1/3, in ownership, if none of foregoing; 1/2, in ownership, if there are no heirs capable of succession (Lardy, Ligislations Suisses, p. 145); Zürich, 1/6 in ownership or 1/6 in usufruct, if descendants; 1/4, in ownership or all, in usufruct, if only parents or their descendants; 1/2, in ownership and other 1/2, in usufruct, if only grandparents or their descendants; 3/4, in ownership and other 1/4 in usufruct, if only greatgrandparents or their descendants; all, in ownership, if no relatives capable of succession (P. R. G., §§ 901, 905; cf. § 900); Glaris, if survivor elects to turn all of his individual property into the succession of the intestate, he will receive a child's share, and if no children, ½ of such succession. Otherwise, he receives no share in the succession (L. B. ii, arts. 303, 304).

12 Leuthold, R. R., p. 79; Lehr, Droit Russe, p. 424.

sized under the influence of feudal ideas, has been continued to a large extent in the modern rules governing the succession of the surviving married party. Finally, the distinction between the successoral rights of husband and wife is retained to a greater degree than in other countries, though the tendency to eliminate the same is quite apparent.

At common law the widow had no hereditary or distributive share in the real or personal estate of her deceased husband. On the other hand, the husband was entitled to all of his deceased wife's personal property, subject to the payment of debts. The widow had her dower right and the husband, if the necessary condition had been fulfilled, was entitled to his tenancy by the curtesy.¹³

The law affecting personal property was modified by an act of the seventeenth century, which gave the widow a share in the intestate's personal estate of one-third, if the decedent left children, and otherwise of one-half.¹⁴ This was a general statute of distributions, but was not intended to apply to the estates of married women.¹⁵ No further change in the rules of succession of married parties has been made in England, except that a statute, enacted in 1890, gives the widow all of the personal estate up to the value of £500 and her distributive share in the residue when the husband dies intestate, without issue.¹⁶ Aside from the restricted interests of dower and curtesy,¹⁷ neither party has any hereditary right to the real estate of the other, and the

¹⁸ Ante, § 25.

¹⁴ Act, 22 and 23, Car. II, c. 10, §§ v, and vi, enacted only for seven years, but re-enacted for similar period by 30 Car. II, Stat., 1, c. 6, and made permanent by I Jac. II, c. 17, cl. 17, § 5.

¹⁵To remove any doubt on this score, a section was incorporated in the "Statute of Frauds" (29 Car. II, c. 3, § xxv), declaring that the husband should enjoy the same rights as before the passing of the statute of distributions.

¹⁶ Act, 53 and 54 Vict., c. 29.

^{17 .}inte, § 40.

same will escheat to the State in the absence of heirs and of testamentary disposition. 18

At first glance, the laws of succession in the United States present a bewildering mass of divergent rules. Aside from the western states and territories that have followed the Code of California, it is difficult to find two legislations that agree in their provisions respecting the succession of married parties. Upon closer examination, however, certain tendencies appear that give promise of greater unity and uniformity.

There is substantial unanimity in according the survivor an interest in the succession of the predeceased intestate married party. This may be a share in the estate as a whole, or it may be restricted to the real or to the personal estate of the decedent. The most significant feature, from the standpoint of matrimonial property relations, is the tendency to place the husband and wife on an equality so far as respects the share of either in the intestate succession of the other.

More than three-fifths of the legislations have established such substantial equality, the interest in general being defined as one existing for the benefit of the surviving married party. While the right to such share arises without

¹⁸ The same appears to be true of one-half of the husband's personalty, where relatives entitled to a distributive share do not exist.

¹⁹ Dower and courtesy are sometimes recognized, in addition to the intestate share, see ante, § 40. Arizona, if issue, ½, but only for life in lands; if no issue, but father or mother, all of personal estate and ½ of real estate in fee; if no issue or parent, all (R. S., 1887, § 1460).

California, if issue, child's share, not to be less than $\frac{1}{2}$; if no issue, but parent, brother or sister, $\frac{1}{2}$; if none of foregoing, all (C. C., § 1386).

Colorado, if issue, 1/4; if no issue, all (An. St., 1891, § 1524).

Connecticut, if issue, ½; if no issue, all up to \$2,000 and ½ of residue (G. S., 1888, § 623, as amended by Laws, 1895, c. 217).

Florida, if issue, child's share; if no issue, all (R. S., 1892, §§ 1820, 1833).

Georgia, if issue, child's share, but widow's share not to be less than $\frac{1}{5}$; if no issue, all (Code, 1895, §§ 3354, 3355).

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regard to the issue of children from the marriage, the amount of the interest increases in proportion to the non-

Idaho, same as California (R. S., 1887, § 5705).

Illinois, if issue, ½ of personal estate; if no issue, but kindred, ½ of real estate and all of personal estate; if no kindred, entire estate (An. St., 1885, c. 39, ¶ 1).

Indiana, if issue, $\frac{1}{2}$, but wife entitled to claim child's share; if no issue, but parent, $\frac{3}{2}$, and if estate does not exceed \$1,000, all; if no issue or parent, all (An. St., 1894, §§ 2640-2644, 2650, 2651).

Iowa, if issue, $\frac{1}{2}$; if no issue, but parents or their heirs, $\frac{1}{2}$; if none of foregoing, all (Code, 1897, §§ 3362, 3366, 3376, 3377, 3382).

Kansas, same as Colorado (G. S., 1889, §§ 2599, 2611, 2619, 2622).

Maine, if issue, dower in real estate and $\frac{1}{2}$ of personal estate; if no issue, but kindred, dower increased to $\frac{1}{2}$ if estate is solvent and same share is taken in personal estate; if no kindred, entire estate in ownership (R. S., 1883, c. 75, §§ 1, 9, c. 103, § 14).

Michigan, if issue, dower and curtesy (cf. ante, § 40, note 16) in real estate and child's share, not to be less than ½ in personal estate; if no issue, but parent, brother or sister or their descendants, ½ of real estate in fee and all of personal estate up to \$1,000 and ½ of residue; if none of foregoing entire estate (An. St., 1882, § 5772 as amended by Pub. Acts, 1889, no. 168, p. 193, § 5847).

Minnesota, if issue. 1/3; if no issue, all (G. S., 1894, §§ 4471, 4477).

Mississippi, same as Florida (An. Code, 1892, § 1545).

Missouri, if issue, dower and curtesy in real estate and, for widow, child's share in personal estate; if no issue, but parent, brother or sister of their descendants, $\frac{1}{2}$ of entire estate in ownership; if none of foregoing, all (R. S., 1899, §§ 2908, 2937-2939.)

Montana, same as California (C. C., 1895, § 1852).

Nebraska, if issue, child's share not less than $\frac{1}{2}$; if no issue, but kindred, $\frac{1}{2}$; if no kindred, all (C. S., 1891, §§ 1124, 1235).

Nevada, if issue, child's share not less than 1/4; if no issue, all (Laws, 1897, c. 106, § 259).

New Hampshire, if issue, $\frac{1}{2}$, but if issue of wife is by former marriage, surviving husband takes only a life estate in $\frac{1}{2}$, unless he is entitled to curtesy; if no issue, $\frac{1}{2}$ (P. S., 1891, c. 195, §§ 10–13).

New Mexico, if issue, 1/4; if no issue, all (C. L., 1897, §§ 2031, 2033).

North Dakota, same as California, except that if no issue, but parent, brother, or sister, survivor takes all up to \$5,000 and ½ of residue (R. C., 1895, § 3742).

Ohio, if issue, dower in real estate and all of personal estate up to \$400 and \$\fomega\$ of residue; if no issue, entire estate, but limited to a life interest in ancestral real property if intestate leaves kindred of blood of ancestor from whom such property was derived (R. S., 1891, \\$\\$4158.4160, 4176).

existence of descendants or of near relatives of the decedent.

Oklahoma, same as California (R. S., 1893, § 6261).

Oregon, if issue, dower and curtesy in real estate and $\frac{1}{3}$ of personal estate; if no issue, entire estate in ownership (An. St., 1887, § 3098, as amended by Stat., Feb. 25, 1889, Acts, p. 72, § 3099, as amended by Stat., Feb. 22, 1893, Acts, p. 195).

South Carolina, if issue, ½; if no issue, but lineal ancestor, brother or sister,½; if none of the foregoing, but kindred, ¾; if no kindred, all (C. S. L., 1893, §§ 1980, 2166).

South Dakota, same as California (G. L., 1887, § 3401).

Texas, same as Arizona, except that issue of parent will limit right of survivor in same degree as parent (R. S., 1895, art. 1689).

Utah, same as North Dakota (R. S., 1898, § 2828).

Vermont, if issue, $\frac{1}{2}$ of real estate in fee, but husband's right is limited to lands of which both parties are seized in right of the wite, and surviving wife takes in addition $\frac{1}{2}$ of personal estate as part of widow's allowance; if no issue, but kindred, entire estate up to \$2,000 and $\frac{1}{2}$ of residue; if no kindred, all (Pub. Acts, 1896, no. 44, §§ 1, 2, 15, Stat., 1894, §§ 2418, 2419, 2546 and 2544, as amended by Pub. Acts, 1886, no. 45, § 1.

Washington, if issue, child's share in real estate, not less than $\frac{1}{2}$, and $\frac{1}{2}$ of personal estate; if no issue, but parent, brother or sister, $\frac{1}{2}$ of real estate and all personal estate; if none of the foregoing, entire estate (G. S., 1881, §§ 1480, 1495).

Wisconsin, if issue, dower and curtesy (cf. ante, § 40, note 12), in real estate, and for widow child's part in personal estate; if no issue, entire estate in ownership (An. St., 1889, §§ 2270, 3935).

Wyoming, if issue, dower; if no issue, 3/4, but if estate does not exceed \$10,000 in value, all (R. S., 1887, § 2221).

Hawaii, if issue, dower; if no issue, but parents or their descendants, ½ in ownership; if none of foregoing, all (C. L., 1884, § 1448, as amended by Laws, 1896, no. 47).

Massachusetts may be placed in this class, as the tendency towards equalization is evident. Surviving husband takes: if issue, curtesy and ½ of personal estate; if no issue, all of real estate up to value of \$5,000 in fee and life interest in residue, and entire personal estate; if no kindred, entire estate in ownership. Widow takes: if issue, dower and ½ of personal estate; if no issue, but kindred, all of real estate up to value of \$5,000 in fee and life interest in residue of which husband died seized, or the same amount and dower in other lands, and all of the personal estate up to value of \$5,000 and ½ of residue above value of \$10,000; if no kindred, entire estate in ownership (P. S., 1882, c. 124, §§ 1, 2, c. 135, § 3 as amended by Acts, 1882, c. 141, and Acts, 1885, c. 276).

It is a curious fact that while the common law rule of curtesy favors the propagation of issue, some of the modern rules of succession may produce contrary effects, as where the survivor is given a child's share. A tendency has appeared to accord the survivor a definite share or, where he is given a child's share, to place a minimum upon the same. It may be noted that in the great majority of those legislations that recognize equal rights of succession for the husband and wife, the distinction between the share in the real and in the personal estate has been abolished.

Most of the remaining states retain the common law rules respecting the succession to real property. The survivor is generally postponed to all heirs or kindred, and in some cases excluded entirely, the property escheating to the state.** It must be kept in mind, however, that in these

²⁰ Cf. preceding note and rules in German, Saxon and Russian codes, aste, notes 11, 12.

²¹ Alabama, Code, 1896, § 1453, but husband has life interest in real estate of intestate wife (*ibid.*, § 2534).

Arkansas, Dig. Stat., 1894, § 2476, but if no issue, widow may take, as against collaterals, ½, and, as against creditors, ½ in fee of non-ancestral real property, of which husband died seized and a life interest in proportionate amounts of the ancestral real property (*ibid.*, § 2542).

Delaware, if no issue, husband takes $\frac{1}{2}$ of real estate, subject to debts, while widow takes a life interest in same amount, and if there are no heirs or kindred she takes such interest in the entire real estate (Laws, vol. 14, c. 550, § 5 in R. C., 1893, c. 76).

Kentucky, Stat., 1894, § 1393, ¶ 9.

Maryland, P. G. L., 1888, art. 46, § 23.

New Jersey, Rev., 1877, p. 297, § 6.

New York, a statute of Mch. 28, 1895 (Acts, c. 171), provided that the surviving wife should inherit the same share of an intestate's real estate as the nearest lineal descendant, and that if no issue existed she should inherit all of such estate. This Act was to go into effect on Jan. 1, 1896, but was repealed by a statute of June 14, 1895 (Acts, c. 1022), which re-established the former rules of inheritance.

North Carolina, Code, 1883, § 1281.

Pennsylvania, if no issue but kindred, widow takes ½ for life (Dig., 1883, pp. 929, 932, §§ 1-3, 6, 28).

legislations the matrimonial property rights of dower and curtesy have generally been retained, and in some cases the husband's interest has been made the same as that of the wife. All of these states, following the English statute of distribution, grant the wife a share in the personal estate of the intestate husband. This interest is usually the one-third or one-half of the English statute, but some of the legislations have departed from the general rule by making the share of the surviving husband the same as that which is accorded the widow.²²

Rhode Island, G. L., 1896, c. 216, § 4. Tennessee, Code, 1884, § 3272. Virginia, Code, 1887, § 2548.

West Virginia, Code, 1891, c. 78, § 1.

District of Columbia, Acts of Maryland, 1786, c. 45, § 2.

²² Alabama, husband, $\frac{1}{2}$; wife, child's part, not less than $\frac{1}{5}$, and if no children, all (Code, 1896, §§ 2534, 1462).

Arkansas, if issue, wife takes $\frac{1}{2}$ absolutely; if no issue, she takes $\frac{1}{2}$ as against collaterals, and $\frac{1}{2}$ as against creditors; if no kindred, survivor takes all (Dig. Stat., 1894, §§ 2541, 2542, 2476).

Delaware, husband takes child's share, and if no issue, all; wife takes $\frac{1}{2}$, if issue, $\frac{1}{2}$, if no issue but kindred, and all, if no kindred (Laws, 1895, c. 207, § 1, R. C., 1893, c. 89, § 32).

Kentucky, husband takes all; wife takes 1/4, if issue, 1/4, if no issue, but kindred and all, if no kindred (Stat., 1894, § 1403); § 2132 of the Statutes, which applies to testate as well as intestate succession, conflicts with foregoing section. It gives surviving married party 1/4 of personal estate of testator or intestate.

Maryland, survivor takes $\frac{1}{2}$, if issue; $\frac{1}{2}$, if no issue, but parent, brother, sister, nephew or niece; otherwise, all (P. G. L., 1888, arts. 120–122, as amended by Laws, 1898, c. 331, $\frac{5}{2}$).

New Jersey, husband takes all; wife takes 1/3, if issue; 1/2, if no issue (Rev., 1877, pp. 784, 785, §§ 147, 148).

New York, survivor takes: $\frac{1}{2}$, if issue; $\frac{1}{2}$, if no issue, but parent; if no issue or parent, but brother, sister, nephew or niece, all, if it does not exceed \$2,000, and if value is greater, $\frac{1}{2}$ plus \$2,000; in other cases, all (R. S., 1889, part ii, c. ii, \$6 75.70.

North Carolina, husband takes all; wife takes: child's part not less than $\frac{1}{2}$; if no issue, $\frac{1}{2}$; if no kindred, all (Code, 1883, §§ 1479, 1478 as amended by Laws, 1893, c. 82, § 1).

Pennsylvania, husband takes child's share, and if no issue, all; wife takes: if

§ 47. Legal Portion.

The fundamental idea at the basis of intestate, as well as of testamentary succession, is that of effectuating the intention of the decedent. The legislative body creates an order of succession which it is presumed would have been established by the deceased had he left a legal testament. In general, therefore, the rules of succession established by the legislature apply only in the absence of testament. But there are other rules that override the will of the deceased. While the individual is accorded the right of disposing of his property by testament, he will not be permitted to do so to the injury of those whose relation to him is such as to justify them in expecting a portion in the succession. The law generally provides that a certain proportion of the share which such person would have in the intestate succession shall be a legal portion, and shall not be subject to testamentary disposition. If the decedent leaves a will and fails to make proper provision for the parties entitled thereto, the latter will be able to claim their legal portion in the succession.' The legislature gives legal expression to the moral

issue, ½; if no issue, but kindred, ½; if no kindred, all (Dig., 1883, pp. 929-932,

Rhode Island, husband takes all; wife, same as in Pennsylvania (G. L., 1896, c. 219, § 9, c. 194, § 9, c. 216, §§ 4, 9).

Tennessee, husband takes all at common law; wife takes child's share, and if no issue, all (Code, 1884, § 3278).

Virginia, same as in Rhode Island (Code, 1887, § 2557).

West Virginia, survivor takes 1/3, if issue, and all, if no issue (Code, 1891, c.

District of Columbia, husband takes all at common law; wife takes, if issue, 1/2, if no issue, but parent, brother or sister or their descendants, 1/2; in other cases, all (Maryland, Acts, 1798, c. 101, part 11).

¹ This is not an absolute right, but is capable of being defeated when the conduct of the party entitled has been such as to justify his disinheritance. The statutes generally provide under what conditions one may be deprived of his legal portion.

right which certain heirs have to a share in the estate of the decedent.

The legal portion (Pflichttheil; portion légitime) obtains very generally in the European continental countries, but has not received any extensive recognition in England or the United States aside from the succession of married parties. may be noted, however, that so far as concerns the United States, at least, the numerous, and, in some instances, disgraceful cases of judicial breaking of wills on the ground of insanity, testify to the operation of the same principle. courts, in effect, declare that no sane person can be presumed to have intended to disinherit those standing in close relationship to him. The fiction of insanity was at the basis of the Roman rule governing the claim to a legal portion as against the testamentary dispositions of the decedent.² may be anticipated that the English law, following the example of other legislations, will ultimately give a rational definition of the legal portion of descendants, etc.

While the principle of the legal portion has received general acceptance in continental legislations, its application, in many instances, has been limited to those standing in blood relationship. The Roman law, in the time of Justinian, was just beginning to recognize the successoral rights of married parties. The principle of the legal portion was not extended to them though the provision for the poor widow was of this nature.³

The states recognizing a community form of matrimonial property relations have been slow to recognize a right of the surviving married party to a legal portion even when, in default of all other heirs, such survivor would be called to the intestate succession. When these legislations accorded the

³ Sohm, /mst., § 113.

⁸ Cf. ante, § 45, post, § 48.

survivor an intestate right of succession as against all heirs,4 they did not give it the character of a legal portion.⁵ It was not the object of the legislator to provide a share for the survivor, but to carry out the intention of the decedent by creating an order of succession which it was presumed the intestate would have established had he not forgotten or neglected to make a will. Thus, these statutes generally require the surviving spouse to count towards his intestate share everything that he has received by way of donation from the decedent, whether the same has come to him as a result of the contract of marriage or otherwise. Where the decedent has clearly manifested his intention by a written testament, the necessity for the application of the statute ceases to exist. The Spanish code furnishes an exception to this class of legislations in according the surviving spouse the same share in case of testate as of intestate succession.6

Of the legislations accepting the system of dowry, the Italian code makes the share of the survivor substantially the same as in Spain by providing a right of usufruct⁷ as a legal portion, while the Austrian⁸ follows the principle of the Roman law.

The codes recognizing marital administration and usufruct as the statutory system, accord the surviving married party a substantial legal portion. In general, the amount is fixed

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⁴ Cf. ante, § 46.

⁵ This is true of the American states which recognize community of property, though the liberal grants of rights in the homestead and allowance for support have created a substantial legal portion. *Cf. post*, § 48.

⁶C. C., 834-837, but if no heirs exist, the legal portion will not be the entire estate, which is the share in case of intestacy, but only ⅓ in usufruct.

¹ Of a child's share, the survivor being counted in the number of children; of $\frac{1}{4}$, if no issue or ascendants (C. C., 812-814); G. La., C. C., 2382.

⁸ B. G., § 796.

at a certain part of the share which the survivor would take in case of intestate succession.9

Among the separate property legislations, Russia provides a legal portion,¹⁰ while in England the principle has not received statutory recognition.¹²

So far as regards the application of the principle of the legal portion to the succession of married parties, the American states have gone farther than most of the European legislations. The recognition of the legal portion in positive legislation is almost entirely confined to the husband and wife. This apparently curious fact finds its explanation in the close relation existing between matrimonial property relations and the law of inheritance. Dower and curtesy are forms of legal portion. When the principle of the legal portion commenced to develop in America, the interest of the wife was the chief consideration, as the husband's marital property rights gave him an adequate share. Since he has been deprived of this interest, the tendency has appeared to accord him a legal portion of the same general character as that which is possessed by the wife.

Two-fifths of the American legislations recognize a legal portion for the survivor and in most of these the share of the surviving husband is the same as that which is taken by a widow.¹² A tendency appears to make the legal portion

⁹ Germany, ½, B. G., § 2303; Prussia, ½, A. L. R., ii, I, § 631; Saxony, if issue, all; if no issue, but heirs of second or third order of succession, ½; in other cases, ½ (B. G., §§ 2565, 2578–2580); Lucerne, all of intestate share taken where issue exists (Lardy, Ligislations Suisses, p. 146); Zürich, ¾ (P. R. G., § 974).

¹⁰ Intestate share in all except acquisitions, which are subject to testamentary disposition (Leuthold, R. R., pp. 79, 80; Lehr, *Droit Russe*, pp. 424-426).

¹¹ Even the widow's dower has been deprived of this character. *Cf. ante*, § 40, Marriage settlements frequently make provision for the survivor.

¹⁸ Colorado, ½ of estate (An. St., 1891, §§ 3010, 3011).
Connecticut, life interest in ½ of estate (G. S., 1888, § 623).
Illinois, if issue, dower and intestate share in personalty; if no issue, may elect

equal to the intestate share, with a general proviso that it shall not exceed a certain proportion of the estate. The share is generally large, in some cases extending to one-half of the entire estate in succession. This represents an extreme position, which is apt to be modified in the interests of children. Moreover, the principle of the legal portion does not require that a married party shall be compelled to confer such a large part of his property upon one whose conduct may have been objectionable, or who possesses ade-

in lieu of above, ½ of entire estate after payment of debts (An. St., 1885, c. 41,

Indiana, $\frac{1}{3}$ of estate (An. St., 1894, §§ 2640, 2642, 2648, 2649).

Iowa, $\frac{1}{3}$ of estate (Code, 1897, §§ 3362, 3366, 3376).

Kansas, ½ of estate (G. S., 1889, § 7239).

Kentucky, dower and 1/2 of personal estate (Stat., 1894, § 2132),

Maine, dower (R. S., 1883, c. 103, §§ 10, 14).

Maryland, dower and $\frac{1}{3}$ of personal estate (P. G. L., 1888, art. 93, §§ 292, 293, Laws, 1898, c. 331, § 3).

Massachusetts, substantially intestate share in real estate; in personal estate, husband entitled to ½ and wife takes intestate share, except that if it exceeds \$10,000 in value, she receives only that amount and the income during life of residue (P. S., 1882, c. 127, § 18, c. 147, § 6, as amended by Acts, 1885, c. 225, § 1, and Acts, 1887, c. 290, § 2).

Minnesota, intestate share in real estate (G. S., 1894, §§ 4471, 4472).

Mississippi, intestate share not to exceed 1/2 (An. Code, 1892, § 4496).

Missouri, substantially intestate share not to exceed that taken where kindred exists (R.S., 1899, §§ 2937-2939, Act, Mch. 2, 1895, Laws, p. 169).

Montana, husband, $\frac{1}{3}$ of estate; wife, dower and, if no issue, $\frac{1}{2}$ of real estate in fee (C. C., 1895, §§ 255, 236, 1703).

Nebraska, intestate share (G. S., 1891, §§ 1124, 1235).

New Hampshire, intestate share, or dower or curtesy and intestate share in personal estate (P. S., 1891, c. 195, §§ 10-13, c. 186, § 13).

Ohio, intestate share (R. S., 1891, § 5963).

Pennsylvania, dower and curtesy and intestate share in personal estate (Dig., 1883, p. 632, §§ 3, 5, pp. 1153, 1154, §§ 2, 6, Laws, 1893, p. 345, § 5).

Vermont, substantially intestate share not to exceed that taken where kindred exists (Stat., 1894, § 2544, as amended by Laws, 1896, no. 45, § 1).

West Virginia, intestate share not to exceed that taken where issue exists (Code, 1891, c. 78, § 11).

quate individual resources. A few of the American states have confined the legal portion to the wife.¹³

The legislations which do not accord a legal portion in the strict sense of the term, divide themselves into two classes. The first class includes those which recognize a community of acquisitions, where the survivor takes his share in the common property and is sometimes given special privileges in the portion of the common property which falls to the decedent.⁷⁴. In the other class, the matrimonial property rights of dower, and, in most cases, curtesy, continue to be recognized.⁷⁵ Moreover, the liberal provisions which very generally obtain for the support of the widow or survivor, have the character of a legal portion.

§ 48. Provision for the Support of the Survivor.

Under all systems of matrimonial property relations, except where perfect community of all property obtains, it is possible that the death of one party may seriously affect the position of the other. Where the household expenses have been defrayed largely, if not entirely, out of the property of the decedent, the survivor, in the absence of suitable provision, may be compelled materially to alter his mode of liv-

¹³ Alabama, dower and intestate share in personalty (Code, 1896, § 4259).

Arkansas, same as Alabama (Dig. Stat., 1894, §§ 2541, 2542).

Florida, dower in real estate; of personalty, if issue, $\frac{1}{2}$; if no issue, $\frac{1}{2}$ absolutely (R. S., 1892, §§ 1830, 1831).

Michigan, dower, or intestate share up to \$5,000, and $\frac{1}{2}$ of residue (An. St., 1882, $\frac{5}{2}$ 5824).

North Carolina, intestate share (Code, 1883, § 2109).

Tennessee, dower and child's share, not to exceed 1/2 of personalty (Code, 1884, §§ 3251, 3252).

Utah, $\frac{1}{2}$ of real estate, or intestate share in entire estate (R. S., 1898, §§ 2731, 2827).

Virginia, intestate share of personal estate (Code, 1887, § 2559).

¹⁴ Cf. ante, § 24, notes 13-17.

¹⁵ Cf. references, ante, § 40.

ing, and may even be unable to secure the necessary subsistence. Such deplorable spectacles are opposed to the moral idea of marriage, and have led to the establishment of the legal portion for married parties. The principle applies with added force to survivors who are in indigent circumstances. At the least, they should be entitled to the necessary alimentary support, under the same circumstances as they could have claimed it during the marriage.

This principle has come to be generally accepted in those legislations which do not accord a legal portion to the surviving married party. The Code Napoléon did not recognize this right for the survivor. The movement to incorporate this principle in the French Code was carried on for many years in connection with the attempt to accord the survivor a share in the succession of an intestate married party. Both principles were finally accepted in the statute of March 9, 1891. The recent Belgian statute, which introduced the intestate share of a surviving married party, has likewise followed the French statute in establishing the claim of such survivor to alimentary support.

The succession of the deceased married party owes maintenance to the survivor, provided the latter is in want thereof. If the survivor has sufficient individual means, he can not claim such alimentary provision, nor can he do so if his intestate share in the succession is sufficient for his needs.

Where the system of dowry obtains, the widow is entitled

¹ The claim which the Roman law gave to the poor widow, had obtained in the pays d'écrit, but it was not admitted into the code. The Louisiana Civil Code retains the Roman rule, but extends it so as to apply to the survivor who is in need (C. C., 2382).

² Cf. ante, § 46.

³ Ibid.

⁴ France, C. C., 205, as amended by Stat., Mch. 9, 1891, art. 2, An. fran., vol. 11, pp. 153, 154; Belgium, C. C., 205, as amended by Stat., Nov. 20, 1896, art. 2, An. ttran., vol. 26, pp. 502, 503; Austria, B. G., § 796.

to lodging for one year, and mourning vestments at the expense of the husband's succession.⁵

It is in the American states that the provision for the survivor has received the greatest acceptance and development. The general provision is that if the estate is insolvent, the personal property, exempt from execution, shall be set aside for the benefit of the widow or survivor. Similar provisions entitle such party to claim the absolute property of the homestead or its use for life or during widowhood.⁶

These measures are natural corollaries to the exemption laws, and must be justified by similar considerations. condition does not exist where the widow or survivor possesses separate property, or where the estate of the decedent is solvent, and the legal portion or intestate share of the survivor is sufficient for suitable support. Notwithstanding these facts, many of the states grant the allowance in addition to the legal portion or intestate share, and do not take into consideration the necessities of the person to whom the same is accorded. In some cases the amount exempted is quite large, and the interests of heirs and creditors are sacrificed without justification. Some of the statutes, however, expressly enact that the provision shall be deducted from the distributive share or legal portion, while others make it dependent upon the necessities of the party entitled. may be anticipated that future revisions will tend restrict the provision to that which is essential for alimentary support.

The original purpose of the legislation was to ensure provision for the widow. Thus, many of the statutes restrict

⁵ France, C. C., 1570; Italy, C. C., 1415; La., C. C., 2374; cf. Spain, C. C., 1379; Austria, B. G., § 796.

⁶ Minor children are usually granted an interest in such exempted property.

the allowance 7 and the use or ownership of the homestead 8 to the widow and, in some cases, the minor children. tendency towards equalization of the parties, which has followed the establishment of separate property, is also manifested in this connection. It is aimed to accord the surviving husband the same rights in his deceased wife's property as the widow possesses in the estate of her deceased husband. Accordingly, in a large number of legislations the provisions respecting an allowance, and the disposition of the

⁷ Ala., Code, 1896, §§ 2072, 2073; Ark., Dig. Stat., 1894, §§ 3, 73; Col., An. St., 1891, §§ 1534, 1536; Conn., G. S., 1888, §§ 574, 605; Del., R. C., 1893, c. 111, Laws, vol. 15, c. 479; Fia., Const., art. x, § 2; Ill., An. St., 1885, c. 3, ¶¶ 74-76; Ind., An. St., 1894, §§ 2419, 2424; Ky., Stat., 1894, § 1403, ¶ 5; Mass., P. S., 1882, c. 135, §§ 1, 2; Mich., An. St., 1882, § 5847; Minn., G. S., 1894, § 4477; Miss., An. Code, 1892, § 1877; N. H., P. S., 1891, c. 195, §§ 1, 2; N. Y., Laws, 1896, c. 547, § 184; N. C., Code, 1883, §§ 2116, 2118; Ohio, R. S., 1891, §§ 6040, 6078, 6079; Oreg., An. St., 1887, §§ 1126-1129; Penn., Dig., 1883, p. 623, § 3; R. I., G. L., 1896, c. 214, § 4; Tenn., Code, 1884, §§3125-3128, 2934; Texas, R. S., 1895, arts. 2037-2039, 2046-2056; Vt., Stat., 1894, §§ 2418, 2419; Va., Code, 1887, § 3640; W. Va., Code, 1891, c. 41, § 27; Wis., An. St., 1889, § 3935.

Ala., Code, 1896, §§ 2033, 2069; Ark., Dig. Stat., 1894, § 3694; Fla., Const., art. x, § 2; Me., R. S., 1883, c. 81, §§ 63-66; Mass., P. S., 1882, c. 123, §8; Mich., An. St., 1882, §§ 7728, 7729; Mo., R. S., 1899, §§ 3620, 3621; N. J., Rev., 1877, p. 1055, § 1; N. Y., C. C. P., § 1400; N. C., Const., art. x, §§ 3, 5; Ohio, R. S., 1881, § 5437, Stat., May 18, 1894, Acts, p. 307; Oreg., An. St., 1887, §§ 1126, 1127; S. C., C. S. L., 1893, § 2129; Tenn., Code, 1884, § 2943; Vt., Stat., 1894, §§ 2183–2185; Va., Code, 1887, §§ 3635, 3637; Wis., An. St., 1889, § 2271.

Ariz., R. S., 1887, § 1094; an additional allowance may be made for widow in case of need, ibid., §§ 1095-1099; Cal., substantially same as Ariz. (C. C. P., §§ 1463–1470); Geo., Code, 1895, § 3465; Idaho, substantially same as Ariz. (R. S., 1887, §§ 5441-5446); Iowa, Code, 1897, §§ 3376, 3312, 3314; Kans., G. S., 1889, §§ 2833, 2619; Me., R. S., 1883, c. 65, §§ 21, 23, 26, c. 66, §1; Md., P. G. L., 1888, §§ 298, 299 gives allowance to widow; Laws, 1898, c. 331, § 3, extends provisions to surviving husband; Mo., R. S., 1889, §§ 105-109 gives allowance to widow to be deducted from her share in personal estate. An act of Apl. 8. 1895 (Laws, p. 35), extends provisions to widower, if the wife dies intestate, but the allowance is not deducted from his intestate share (see R. S., 1899, §§ 105-109, III); Mont., substantially same as Ariz. (C. C. P., 1895, §§ 2581-2586); Neb. C. S., 1891, § 1235; Nev., substantially same as Ariz. (G. S., 1885, §§ 542, 2790-2796); N. J., Rev., 1877, p. 762, § 52; N. M., C. L. 1897, §§ 2041, 1993, 1994; Oklah.,

homestead ²⁰ apply to the survivor, whether widow or widower.

substantially same as Ariz. (R. S., 1893, §§ 1300-1308); S. D., substantially same as Ariz. (C. L., 1887, §§ 5779-5786); Utah, R. S., 1898, § 2831; Wy., substantially same as Ariz. (Laws, 1890-91, no. 70, c. xiii, §§ 1-7).

¹⁰ Ariz., R. S., 1887, §§ 1094, 1100; Cal., C. C. P., §§ 1465, 1474, C. C., § 1265; Col., An. St., 1891, § 2135; Conn., G. S., 1888, § 2783; Idaho, R. S., 1887, § 5441; Ill., An. St., 1885, c. 52, ¶ 2; Iowa, Code, 1897, § 2985; Kana., G. S., 1889, §§ 2595, 2619; Ky., Stat., 1894, §§ 1706, 1708; La., Const., art. 244; Minn., G. S., 1894, § 4470; Mont., C. C. P., 1895, §§ 2581, 2584, C. C., 1895, §§ 1703; Neb., C. S., 1891, § 1124; Nev., G. S., 1885, §§ 542, 2790; N. H., P. S., 1891, c. 138, §§ 2, S; N. M., C. L., 1897, §§ 1749, 1994; N. D., R. C., 1895, § 3626; Oklah., R. S., 1893, §§ 1300, 1302; S. D., C. L., 1887, §§ 5779–5781; Texas, R. S., 1895, arts. 2057–2062; Utah, R. S., 1898, § 2831; Wy., R. S., 1887, § 2782, Laws, 1890–91, no. 70, c. xiii, § 8.

APPENDIX.

NOTE A. (See § 38, note 19.)

Miss., An. Code, 1892, § 2289. Married women are fully emancipated from all disability on account of coverture, and the common law, as to the disabilities of married women and its effect on the rights of property of the wife is totally abrogated, and marriage shall not impose any disability or incapacity on a woman as to ownership, acquisition, or disposition of property of any sort, or as to her capacity to make contracts and do all acts in reference to property which she could lawfully do if she were not married; but every woman now married or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of all property, real and personal, in possession or expectancy, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued, with all the rights and liabilities incident thereto, as if she were not married.

NOTE B. (See § 38, note 21.)

Ohio, R. S., 1891, § 3144. A married person may take, hold and dispose of property, real or personal, the same as if unmarried.

Penn., Act of June 8, 1893 (Laws, p. 344), § 1. Hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell or otherwise dispose of any property of any kind, real, personal or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner, and to the same extent as an unmarried person, but she may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance.

England. Act, § 45 & 40 Vict., C. 75, § 2. Every woman who marries after the commencement of this Act shall be entitled to have and hold as her separate property, and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic or scientific skill.

NOTE C. (See § 38, note 22.)

Mich., An. St., 1882, § 6295. The real and personal estate of every female, 178

acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance, devise or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations or engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her as if she were unmarried.

NOTE D. (See § 38, note 23.)

Dist. of Col., Act of June 1, 1896 (U. S. Stat. at Large, Vol. 29, p. 193), § 1. The property, real and personal, which any woman in the District of Columbia may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and real, personal or mixed property which shall come to her by descent, devise, purchase or bequest, or the gift of any person, shall be and remain her sole and separate property notwithstanding her marriage, and shall not be subject to the disposal of her husband or liable for his debts, except that such property as shall come to her by gift of her husband shall be subject to, and liable for, the debts of the husband existing at the time of the gift.

NOTE E. (See § 38, note 24.)

Col., An. St., 1891, § 3007. The property, real and personal, which any woman in this State may own at the time of her marriage, and the rents, issues, profits, and proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, including presents or gifts from her husband, as jewelry, silver, tableware, watches, money and wearing apparel, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts.

NOTE F. (See § 40, note 7.)

Soliloguy of an old lawyer occasioned by the abolition of dower and curtesy in Mississippi (quoted in Miss., An. Code, 1892, p. 573, note): "Venerable relics of antiquity, you have come down to us from a former generation. You have survived the wreck of empires and change of dynasties. Born away back in the womb of time, whereof the memory of man runneth not to the contrary, you have outlived the war of the Roses, passed safely through the Protectorate, crossed the ocean, survived the great American Revolution, and rode out the storm of the late great war. Whatever attendants were absent from the bridal altar, you two, at least, were always there; and when the bride and groom mutually murmured, with all my worldly goods I thee endow,' you, as priest and priestess, sealed the covenant. Like shades, you've followed the twain blended into one, and when either fell, one of you administered the balm of consolation to the survivor. If pure religion and undefiled be to visit the fatherless and the widow in their affliction, thy mission has been akin to it. Venerable priest and priestess of the common law, farewell! You have been pleasant in your lives, and in death have not been divided."

LIST OF STATUTES WITH EXPLANATION OF SOME OF THE ABBREVIATIONS USED IN REFERENCES.

Acts, Vict.—The Public General Statutes passed in the ... year of the reign of Her Majesty Queen Victoria.

Ala., Code, 1896.—Alabama. Code of 1896.

An. étran.—Annuaire de Législation Étrangère. Paris.

An. fran.-Annuaire de Législation Française. Paris.

Ariz., R. S., 1887.—Arizona. Revised Statutes of 1887.

Ark., Dig. Stat., 1894.—Arkansas. Digest of the Statutes of 1894.

Austria, B. G.—Das allgemeine bürgerliche Gesetzbuch für das Kaiserthum Oesterreich. Vienna, 1883.

Austria, R. G. Bl.—Reichs-Gesetz-Blatt für das Kaiserthum Oesterreich.

----- Reichsgesetzblatt für die in Reichsrathe vertr. Königreiche und Länder.

Basle, Stat., Mch. 10, 1884.—Kanton Baselstadt. Gesetz betreffend eheliches Güterrecht, Erbrecht und Schenkungen. References are to translation in An. étran., Vol. 14, p. 545 seq.

Bull. des lois.—Bulletin des lois de la République Française. Paris.

Cal., C. C.—California. Code as amended to 1885.

Cal., C. C. P.—California. Code of Civil Procedure.

Cod.—Codex Justinianus recognovit Paulus Krueger. Berolini, 1895.

Col., An. St., 1891.—Colorado. Mill's Annotated Statutes of 1891.

Conn., G. S., 1888.—Connecticut. General Statutes of 1888.

Del., R. C., 1893.—Delaware. Revised Code of 1852 as amended to 1893.

Dig.—Digesta recognovit Theodorus Mommsen. Berolini, 1893.

Dist. of Col., R. S., 1873-74.—Revised Statutes of the United States relating to the District of Columbia.....passed at the first session of the 43d Congress. Washington, 1875.

- I. Entwurf.—Entwurf eines bürgerlichen Gesetzbuchs für das Deutsche Reich. Berlin, 1888.
- II. Entwurf.—Entwurf eines B\u00fcrgerlichen Gesetzbuchs f\u00fcr das Deutsche Reich. Zweite Lesung. Nach dem Beschlusse der Redaktionskommission. Berlin, 1894.
- III. Entwurf.—Entwurf eines Bürgerlichen Gesetzbuchs. Dem Reichstage vorgelegt in der vierten Session der neunten Legislaturperiode. Berlin, 1896.

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PREFACE

This work is intended to be a contribution to the history of partisan politics in the United States. Its primary purpose is to deal with the machinery and methods used by a certain great political organization which has played a part in Amercan history. The issues upon which that movement based itself are also treated, but it has not been the purpose of the writer either to advocate, defend or condemn them. They are dealt with just to the extent that seems necessary to make intelligible the story of the organization that worked in their name.

The partisan system of the American people is the link between the people and the government which both rules and serves them. It is a mechanism that has grown up from the needs of the nation, altering from time to time as conditions change. Its duty is to respond to public sentiment on vital questions of the hour, to test the strength of such sentiment at the polls, and to enact the sentiment into law or administration if the people so express themselves. There have been times in American history when the partisan system failed to meet its duty squarely, and those are times of political confusion and re-arrangement. It was in one of these periods that the nativist movement came into state and national politics. Its experience is full of suggestion for those who like to trace the reasons of political changes. The story of the brief and stormy career of the Know-Nothing movement shows how an issue rejected by the regular parties can struggle into power despite them and to their hurt. It shows how public sentiment can cast aside an old political organization and build a new fabric when needs require. The issue of 203]

nativism wrecked the older party structures and was itself wrecked in turn by a stronger issue.

In tracing the evolution and fate of this interesting political experiment there have been many difficulties resulting from the peculiar nature of the organizations which sprang up from time to time to voice the sentiment of nativism. One of the features which has been especially productive of confusion in the pages of writers on political history has been the fact that there have been two classes of political organizations in American politics. One class is that with which the public is most familiar to-day. It is an organization whose extent is national, and whose aims include that of securing control of the national government. An organization of this sort cultivates exclusiveness in the control of voters. It seeks to make itself distinct from other political organizations and to make the division clear-cut between its adherents and those of similar organizations. We call it a political party. The second class of organizations are less familiar to-day than they were fifty years ago. They are of the type which Mayor Harper of New York city, in 1844, called "a political organization distinct from party." Usually an organization of this sort has no national scheme of effort, but plays its part in state or local poli-The special characteristic of this class, however, is not the area which it covers but the nature of the allegiance which it demands from its members. It is not exclusive in its claims. It permits its members to belong to other political organizations and to act openly with them. This type of organization the writer has preferred to call a "movement" rather than a "party." It was these "movements," which sprang up to represent the issues which the organizations of the regular parties refused to assume, that caused the extraordinary confusion of American politics in the decade of the fifties. The rise of nativism, as well as many other phenomena in American history are best understood when the real nature of a " movement" is kept in mind.

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CHAPTER I

BEGINNINGS OF NATIVISM, 1807-1843

Among the many political issues which have at one time or another claimed the attention of the American people that of nativism has its place in history. It meant hostility to every non-American influence that could clash with the settled habits of the American community. In the field of national politics it first appeared in organized form in 1845 as the Native American Party, but it shortly disappeared after a brief exhibition of activity. In 1854 it suddenly came into the field again, this time upheld by the Know-Nothing Order, and again collapsed after a short life of three years, shattered by the impact of a rival issue. Since then nativism has been absent from national politics, but it has flashed up from time to time in the politics of the commonwealths, and there is no certainty that it may not again, sometime, astonish the nation by a new stride to the front. The Native American movement of 1845 was too weak and too unsuccessful to leave any real impress upon the political memories of the nation. The Know-Nothing Order, on the contrary, was strong for a time and startling in the changes that it wrought. It brought before the people new ideas and new methods. It roused earnest enthusiasm and bitter hatred that endured long years after the Order itself had passed away. But yet its career was too brief to permit it to be really understood then or since. It has remained a curious political memory, whose origin and aims and sources of strength are obscure topics in the annals of political change.

The doctrine set forth by these two national organizations 213]

was practically the same in both cases. In the earlier movement it was often called "Native-Americanism," and in the later movement "Know-Nothingism," but the word "nativism" proved to be equally descriptive and far more convenient. The basic idea of nativism was that a person whose primal sympathies or interest lay outside of the American bodypolitic could not be in real sympathy with the American system, and must, therefore, be a danger to that system. the idea of nativism was applied more specifically, it took two chief forms. It declared, first, that any person of foreign birth was unfitted for citizenship until time had obliterated his active interest in the mother-land from whence he came, and, second, that any person in the Roman Catholic church was unfitted for citizenship, because obedient to an extra-territorial ruler. All through the struggle of nativism for recognition these twin sentiments went side by side as associates, backed by a single political propaganda and seldom clearly differentiated. Wherever the political movement raised itself it was founded upon these two ideas. The sincerity of their advocates was often doubtful, for in some states the nativist movement was a mere cloak for local issues or political intrigue, but whatever was the real fact, the movement everywhere affected a belief in the twin doctrines of nativism. In every state it was ostensibly hostile to aliens. In almost every state it was frankly anti-Catholic.

The study of nativism in the politics of New York is peculiarly interesting, because New York city was a great center of organized nativism. The sentiment of nativism was ever strongest, it may be said, in those cities of the sea-board and of the great West which were depots of immigration. It was in New York city that the impulse began which developed into the Native American Party of 1845. It was here, also, that the nativist system of secret politics was begun. It was here, too, that the Know-Nothing Order was founded and built up. It was in New York and Philadelphia that nativism

was most typical and genuine as a sentiment. The character of popular nativism was everywhere shaped by local conditions and local prejudices. In New York city and throughout New York state it was particularly directed against the Irish-Catholic element of the population. Nativism was not merely a political theory here. It was a feeling based upon deep-rooted antipathies of the past, upon glaring abuses of the present, and upon earnest anxieties for the future. How well founded these feelings were it is not necessary now to say. They existed, and political nativism drew its strength from them.

In tracing the antecedents of the nativist movement in New York state the mind naturally harks back to those occasional appearances of anti-Catholic feeling under the colonial establishment. In the eighteenth century men of English blood and English speech still vaguely feared the heavy hand of the Roman church. The new American commonwealth, which was born of the old province of New York in 1776, was largely English in blood, and much more largely English in thought. To its people there came as a heritage from their English past a fear and a hatred of Rome. In the State Convention of 1777 the debates over the proposed constitution showed this old inherited fear, and, though the constitution itself was spared the blemish of open anti-Catholicism, the official oaths then put in force were such as to bar conscientious Catholics from office.1 At this time there was not a single Catholic congregation in the state to alarm the constitution makers. Their hostility to the Roman church was based only on theory.

It was not long before the Catholic church made its appearance in the state. First a mission was established, and then in 1786 the first congregation came into existence by the consecration of St. Peter's church in New York city. The chief city of the state began to grow steadily as soon as it was released from the danger of war. The steady flow of trans At-

¹ Shea, ii, p. 158.

lantic immigration set in, bringing over English and Irish people in greater numbers year by year. Many of the Irish were probably Protestants in faith, but the Catholic element was large, and much of it was gathered into the congregation of St. Peter's. The Irish population massed itself, too, on certain streets, making its separateness in the community more noticeable. Finally, in 1806, came the earliest notable exhibition of native hostility to this foreign element, growing out of the inherited feelings of the community. On Christmas Eve a crowd of non-Catholics gathered in front of St. Peter's church to interrupt the services, but were disappointed to find none in progress. The news of the incident spread. Christmas night a crowd of Irishmen rallied to the scene and a street fight began. The city watchmen interfered and one of them was killed by a knife-thrust from an Irishman. The non-Catholics now gathered in force, the Irish were put to flight, and except for the hurried arrival of Mayor Dewitt Clinton, their homes would have been sacked by the victors.1 This isolated incident shows how early there existed antagonism directed against the Irish-Catholic population. Their separateness in life and habits invited it.

Probably the most important element in this antipathy was the pure contempt which men usually feel for those whose standards of life seem inferior. This feeling was felt toward all immigrants of the poorer class, irrespective of their race. To the mind of the average American the typical immigrant was a being uncleanly in habits, uncouth in speech, lax in the moralities, ignorant in mind and unskilled in labor. This attitude of mind is reflected in the gibes and comments of the press when it had occasion to refer to the new-come peoples. The immigrant bore a stamp of social inequality, not to be overlooked while it existed, and suggesting an impersonal sort of antipathy on the part of the native-born. In addition to this, so far as the Irish were concerned, there was the

1 American Register, i, p. 14.

primal fact of racial difference between them and Americans. The English immigrant easily settled down among men of his own blood and tradition, was understood by them, and soon accepted as a fellow. The Irish immigrant, of another blood and another thought, stood somewhat apart in character. He was not so well understood, nor so easily accepted by men of English blood and American birth. The same was true of the other non-English nationalities, but being weaker in numbers, they were quickly absorbed, while the thousands of Irish held clannishly together, and prevented absorption. It may also be true that the traditional English dislike for the Irish people had a certain vague response in the American branch of the race.

At the time of the Christmas riot of 1806 the Irish population of New York City numbered several thousand souls, and was beginning to be a factor in local politics. The first appearance of political nativism followed closely upon the riot. In the spring of 1807, when assemblymen were to be chosen, some of the local Federalists put forward an "American ticket," and supported it by inveighing against the growing power of the foreign vote.¹ The ticket failed to enlist enough support to be successful, and from that time there seems to have been no important appearance of nativism in politics for many years. Year by year the Irish element continued to grow. In 1808 the congregation of St. Peter's was roughly reckoned at 14,000 souls, mostly Irish. In 1810 the Irish-American press began with The Shamrock.2 Instead of being Americanized, the Irish element steadily maintained its own separateness as years passed. It had its own region of settlement, its own church and its own press. Its influence on elections also grew. In 1812, as an instance, the Democratic Party in the city appealed especially to the Irish for aid against the Federalists.3 An estimate made by the Catholic bishop in 1815 reckoned 13,000 souls in his diocese, of whom 11,000, he

¹ Smith, p. 10.

² Kehoe, ii, p. 686.

⁸ Smith, p. 10.

thought, were Irish.² A continuous stream of immigration flowed into the country through the port of New York after the war with England closed in 1815. The stream left a residuum in the city as it passed through to the interior. From this stream the Irish-Catholic community was constantly recruited. The digging of the Erie canal employed an army of Irish laborers in the interior counties, and small groups became permanent settlers at various points. By 1826 a new bishop was able to estimate the Catholic population at 25,000 in New York city alone, and 150,000 in the whole New York diocese.² New Catholic congregations came into existence in various parts of the state as a result of the work on the Erie canal. In 1829 there were eight churches in the interior and five in New York city and Brooklyn.³

During this growth of the Irish population the attention of native Americans was called to them in ways often unfavorable. A burden of pauperism and crime was laid upon the American public by the growth of foreign immigration, and the Irish attained an unenviable reputation for their own contribution to the burden. Since 1817 the city of New York had been obliged to give public aid to the foreign poor, and when alien population reached the interior a cry for relief was heard. In 1830 an effort to shift the burden of the counties upon New York city met a protest. The city complained that it was itself overburdened with expense, and that the cost of its almshouse, bridewell and penitentiary was more than half caused by the foreign element.4 The lawlessness and pauperism of the Irish were the first real and definite grievances held against them by the natives of the soil. Their clannishness caused them to be looked upon as people who not only were strangers to American society, but were determined to remain so. Their social life and thought were centered around their church, and that church resolutely held itself

¹ Shea, ii, 196. ² Ibid. ³ Ibid.

⁴ N. Y. Assembly Docs., 1830, No. 260.

aloof from the ideas of the New World. It began to be felt by Americans, consciously or unconsciously, that a church which showed no inclination to put itself in touch with American ideas was one to be viewed with distrust. the attention of Americans seems to have been drawn more closely to the Roman Catholic church as a consequence of the flurry in England over the subject of Catholic emancipation. The hostility to the Roman church which was awakened in English pulpit and press by the emancipation idea found an echo in the United States, and political anti-Catholicism came fairly upon the scene at last. The warning was raised by the religious press against danger from papal power. It met very little response indeed from the people, but it at least reinforced the distrust which had been growing against the Irish Catholics and the church to which they belonged. The idea was broached here and there that the presence of Catholics in an I American community might be a political danger, on account of the obedience that they owed to the Pope. The essential features of nativism had been brought before the people of New York by 1830 as a natural result of the social conditions of the time. The Irish-Catholic element had become disliked because it exemplified the most objectionable features of alien manners and an alien church. The dislike only needed formulation and a theory to become open and active nativism.

The vague antagonism against the foreign Catholics which had gradually grown up in New York city out of existing conditions finally reached the point of organization in 1835. The impulse which brought this about was the publication by the New York Observer, early in 1834, of a series of twelve letters signed by "Brutus," under which pseudonym was concealed the personality of Samuel F. B. Morse, afterward famous as inventor of the telegraph. Morse wrote these letters immediately after a visit to Europe. While at Vienna he had learned of the existence of the Leopold Foundation, a Catholic organization intended to aid church expansion in

America. This society seemed to him designed to subvert American liberty, and when he returned to New York he embodied his knowledge and his views in the Brutus letters. His thesis was that the Holy Alliance and the Papacy had organized the Leopold Society to build up Catholic power in America; that the American Catholic hierarchy was to gain control of American politics and society, and to shape them as ordered by its absolutist masters; that the work had actually been begun and must be checked. He suggested as protective measures the denial of the electoral franchise to future immigrants and the demand by public opinion that the Catholic clergy make public its administrative work as the Protestant churches were accustomed to do.1 These letters of Brutus formulated an anti-Catholic argument for Americans. attracted a great deal of attention all over the country by their evident sincerity, and the directness of their accusations. The existence of an un-American foreign element was raised to the dignity of a national problem. In New York city, where Morse was known personally, the Brutus letters gave great impetus to the idea of taking definite measures against the very evident growth of foreign influence. Nativism could henceforth surround itself with the sanctity of patriotic professions.

During the year 1834 the seed sown by Morse was taking root. One of its results was the formation of the New York Protestant Association, whose object, according to an official statement, was "to spread the knowledge of gospel truth and to show wherein it is inconsistent with the tenets aud dogmas of popery." It was not a political body, but it seems to have used political arguments against the Catholic church. The denunciations of Catholicism, which were uttered regularly at its meetings, exasperated the Catholic element, until finally the irritation broke forth into violence. On March 13, 1835, one of the association meetings was held at Broad-

¹ Foreign Conspiracy, a reprint of the Brutus letters.



way Hall to discuss the question "Is popery compatible with civil liberty?" In the midst of the proceedings a crowd of visitors were seen forcing their way through the audience and beginning a disturbance that straightway turned into a free fight. The presiding clergy hurriedly fled, and amid the crash of breaking lamps and benches, the discussion ended. The intruders at this meeting were Irish-Catholics, and though the Catholic clergy hastened to disavow the act and to express regret, the mischief was done. In the presence of this object-lesson of Catholic aggressiveness the Brutus letters took on new meaning as a warning to Americans.

Just two weeks after the affair at Broadway Hall political nativism launched itself into local politics. On March 27, 1835, a caucus of American-born citizens of the Fourteenth Ward met to nominate a distinct ward ticket. At least one other ward followed this example at once. The Democratic press gave the movement notice by denouncing it as a Whig device and implying insincerity in its effort.3 On the latter point the press was probably wrong, but the reference to Whig approval was entirely correct. The Whig press encouraged nativism softly and Whig caucuses endorsed its nominees for office. It is owing to this latter fact that the identity of the movement was completely lost and that the poll of votes gives no hint of its strength except to show that Whigs and nativists together could not carry the wards in which nativists were organized. The nativist and Whig alliance which showed itself in the city election of 1835 is a fact to be noted. All through the quarter-century that nativism played a political part in New York there was close relation between the two. It had the appearance of a natural affinity, but it was due to the fact that Democratic leaders steadily refused to ally themselves to a movement which would lose them the confidence of the Irish-

¹ Courier-Enquirer, 1835, March 19. 2 Courier-Enquirer, 1835, April 3.

³ Post, 1835, March 30.

Catholic vote. Whig leaders, on the other hand, could do so readily, and did not hesitate to join hands with nativism when to their interest. The election of 1835 is also notable as showing American protest against foreign interference at the polls. This was one of the grievances of nativism. From a very early period the loafer and bully had been features of election work in New York city, seizing every opportunity for violence and fraud that would favor the tickets for which they worked. This sort of thing was objectionable enough when carried on by natives of the soil, but it was unbearable when taken up by aliens. When ward leaders aggravated the abuse by organizing the despised foreign element into gangs to carry on the old work of assault and brow-beating there arose a note of protest. The social inequality between assaulters and assaulted was too apparent.

The nativist movement of 1835 was too weak at its beginning to create at once a general city organization, but after the spring election was past it was enabled to supply the need. In the Common Council which met after election there occurred the incident of a foreign-born member rising to move the dismissal of an office-holder who happened to have served in the Revo-It was a very convenient event for the nativist leaders, and they at once took advantage of it. A public meeting was called by them "to take into consideration means to counteract the undue influence which foreigners now possess over our elections, and also to consider the propriety of foreigners holding offices which can be filled by native citizens." Here, nearly twenty years before the Know-Nothing movement, was the announcement of one of the ideas for which that movement stood, namely, the exclusion of foreigners from public office. It is to be noticed that although the nativist movement of 1835 had its start in suspicion of foreigners as

¹ Courier-Enquirer, 1835, April 15.

² Courier-Enquirer, 1835, June 10.

⁸ Post, 1835, June 9.

Catholics, yet it did not base itself on any religious issue. It placed itself before the people as an exponent of good citizenship only. It may properly be said here, as throwing light on all that comes after, that nativism in New York city from first to last was mainly an expression of antagonism toward the clannishness of Irishmen and Irish ways. Nativism at times worked on a theory of good citizenship, and attracted an element to whom that idea appealed. At other times it worked upon a theory of religious effort, and received support from people whose sympathies were enlisted on the side of religion. Whatever were its professions, however, nativism always drew its vitality from the half-instinctive feeling of racial antagonism between Anglo-American and Celtic blood.

The public meeting that was called by the nativist leaders took place June 10, 1835. Its resolutions form one of the earliest documents of political nativism in New York. They eulogized the services of Revolutionary veterans, protested against their removal from office by foreigners, condemned the holding of office by aliens, and ordered a general organization of nativists in the city. The most important of them was this:

Resolved, That we as Americans will never consent to allow the government established by our Revolutionary forefathers to pass into the hands of foreigners, and that while we open the door to the oppressed of every nation and offer a home and an asylum, we reserve to ourselves the right of administering the government in conformity with the principles laid down by those who have committed it to our care.

The meeting of June 10th was a preliminary to general organization. James Watson Webb, editor of the Courier and Enquirer, took great interest in the movement and put his press at its service. In later years, he took to himself the credit of its existence. On June 27th he began to urge citizens to organize as nativists for political action. The field of local politics was, of course, already occupied by the two great national

1 Courier Enquirer, 1855, June 7.

parties at this time, but the new movement was not planned to be antagonistic to either. It was to be a local organization which voters might join without casting aside their regular party affiliations. A mass-convention, called for by the meeting of June 10th, seems to have taken place early in July and to have organized the new movement under the name of the Native American Democratic Association. An executive committee was appointed with power to issue a declaration of principles, that is to say, a platform. On July 10th, the declaration was issued and the new movement was then fairly under way as a factor in the politics of the city at large. Its official organ was a little paper called the Spirit of '76. The official head of the movement was James O. Pond, chairman of the general executive committee.

The principles of the movement, as declared in its platform, were opposition to office-holding by foreigners, opposition to pauper and criminal immigration and opposition to the Catholic church. Its opposition to the church was placed on the ground that the church was a political engine. The platform further declared that the movement was not a part of the Whig Party, but that it stood outside of party lines. Through the summer of 1835, the work of organizing different wards was pushed with some success, aided by the steady preaching of the nativist press. All the latent antipathy toward Irishmen found an outlet as the nativist movement got on its feet. Although the movement was professedly anti-foreign in a broad sense, yet the utterances of the time always singled out the Irish for denunciation. Specific causes of offense were eagerly sought for by the nativist press, although the real offense was not specific at all. An anonymous writer to the press touched on the truth when he complained of the Irish Catholics that "they are men who, having professed to

¹ Courier-Enquirer, 1835, July 14.

² Courier-Enquirer, 1835, October 9.

become Americans by accepting our terms of naturalization, do yet, in direct contradiction to their professions, clan together as a separate interest and retain their foreign appellation." No better statement of nativist complaint could have been made.

The managers of the new movement held their organization firmly to local politics, even repudiating their official organ because it declared its presidential preferences.2 The policy was made necessary by the bi-partisan character of the organization. At the same time the undercurrents of politics were drawing the nativist organization into close touch with the local Whig Party. At this period political nominations were usually made by co-operation of committees and mass-meetings. It was customary to hold a mass-convention of voters to appoint a committee on nominations. This committee was expected to make out a ticket and present it before a second mass-convention for acceptance. It was a clumsy method and New York city was soon to outgrow it, but by this system the first nativist local ticket 3 was made in October, 1835. was headed with the name of James Monroe, nephew of the president of that name and a prominent citizen of the city. At the announcement of this ticket the local Whig leaders decided to throw their influence in its favor. This was done. not by formal endorsement but by mere omission to name any Whig nominees. This act left the local contest one between nativists and Democrats.

The rise of nativism in New York city with its suggestion of suppressing foreign influence had meanwhile touched a responsive chord in other places where the foreign element was known. In Kings county a nativist movement nominated an assemblyman and the local Whig organization stepped aside



¹ Imminent Dangers. ² Courier-Enquirer, 1835, October 9.

² Congress, James Monroe. Assembly, Orlando Waller, James O. Pond, Anson Willis, Frederick A. Tallmadge, Adrastus Doolittle, Isaac P. Whitehead, John Monat, Charles Weeks, Jr., Clarkson Crolius, Jr., Robert B. Ruggles, Abel Decker.

to give it the field. In Albany county the Whigs engrafted nativism upon their local platform. Wherever the nativist movement showed itself the Whig leaders turned to it hopefully as an influence that was necessarily arrayed against the Democracy. The latter party took heed. In New York city the Democratic leaders temporarily put aside their foreign friends as a sop to the new sentiment and made their local ticket as purely American as the nativist ticket itself.² The extraordinary growth of the new movement was a surprise. At the November election it nevertheless failed of success. Brooklyn it elected John Dikeman to the Assembly, but in New York, even with Whig support, it cast only forty per cent. of the total vote. At the same time it was a very encouraging thing for the nativist leaders to find so hearty a response as had been given to their doctrine. It indicated better success at future elections.

The nativist movement maintained its organization through the winter after the campaign of 1835. The ward associations of this period were in the nature of political clubs permanently organized. Nativism busied itself in circulating petitions asking for change of naturalization laws.² When presented to Congress in June following they formed a roll of 5000 names.

As the spring election of 1836 drew near, the nativist executive committee called the usual conventions and ward caucuses. On April 7th the name of Samuel F. B. Morse was accepted as a nativist nomination to the mayoralty.³ No more typical and thorough nativist could have been chosen than the author of the Brutus letters, yet in one respect the selection was unfortunate. He was a Van Buren Democrat on national issues and on the eve of a presidential election the Whig leaders refused to lend support to a recognized Democrat.⁴ The Whig Party in New York city was called together to make a

¹ Courier Enquirer, 1835, November 2. ² Courier Enquirer, 1836, March 12.

^{*} Courier-Enquirer, 1836, April 8. Courier-Enquirer, 1836, April 11.

separate nomination, and by this action Morse lost all chance of election. On ward tickets, however, the nativists and Whigs effected a fusion. There is little to say of the brief local campaign. The vote on mayor ** stood as follows:

Democratic Party					. ab	out	15,950	votes.
Whig Party					. ab	out	6,130	votes.
Equal-Rights movement.2					. ab	out	2,710	votes.
Nativist movement			_		. ab	out	1.400	votes.

On the ward tickets the fusion vote won control of the Common Council and was able to dictate a distribution of city patronage on nativist principles. This was a gain of some importance for nativism. Nevertheless this did not conceal the inability of nativism to make political headway as an independent movement.

A presidential campaign followed the spring elections, and the attention of the public was turned away from the issues which the nativist movement sought to present. Still the organization persisted. In October another nativist ticket was made up, and the Whig leaders again gave it their support, bringing it before a Whig mass-convention, and endorsing every nominee but one. The political press of New York city was too busy with weightier matters to pay much heed to local politics in this campaign, and nativism received little notice. The movement still held to life in Brooklyn with much the same relations to the Whig Party that it had in New York. It was beginning to be viewed by the public as an annex to the Whig organization. From the vote of Novem-

¹ Valentine Manual, 1854.

² The Equal-Rights organization took its name from its opposition to the creation of monopolies.

³ Congress, Edward Curtis, Ogden Hoffman, Ira B. Wheeler, James Monroe. Senator, Frederick A. Tallmadge. Register, James Gulick. Assemblymen, none.

^{*} Courier-Enquirer, 1836, November 1.

ber, 1836, the strength of the political groups in New York city seems to have been as follows:

Democratic Party .		•	•		•		•	, about	15,520	votes.
Whig Party								. about	15,130	votes.
Nativist movement								. about	1,610	votes.
Equal-Rights moveme	nt							. about	960	votes.

Nativism had apparently gained slightly in political strength owing to the popularity of Colonel Monroe, who was again on its ticket this year.

Again political nativism appeared before the public in the spring of 1837, as the city election approached. On March 13th its convention nominated Aaron Clark for the mayoralty, and drew up an address vigorously denouncing the Irish as an element which deliberately kept separate from the American people, and followed clerical dictation in matters political. As was expected, the Whigs endorsed the candidacy of Clark, and this time the fusion was successful in carrying the city. Clark was elected by 3300 plurality, with a common council of the same politics. In this campaign the nativist movement cannot be estimated apart from the Whig Party. The constant alliance of nativists with Whigs had brought about the practical absorption of the weaker organization. The fusion was complete. The daily press treated the election as a Whig victory solely, and neither in the struggle itself, nor in the political gossip that followed the struggle, was nativism referred to as a distinct element. The nativist

¹ In this work the strength of split tickets has been figured in the following way: First is figured the median vote of each political group, that is to say, that vote in each group which, when applied to the various combinations on split tickets, will give the least variation from the actual poll of the several nominees. Second, the poll of each nominee who represents more than one group is divided among those groups in proportion to the median vote of each group. Third, an average of the poll assigned to each group is made, and represents the strength of the ticket of that group.

² Commercial Advertiser, 1836, November 12. ³Herald, 1837, March 14.

movement, in fact, ended with this election, absorbed in its hour of triumph. When the new Common Council took control the leaders of nativism took office and were henceforth Whigs. It is possible that the Native American Association may have continued in life as a non-political body, but facts are obscure as to its fate.

It was four years before nativism in New York city again declared itself as an organized political movement, but chance references here and there show the existence of non-political societies during that interval whose work was more or less along nativist lines. Their presence bridges over a gap in which the old antagonisms, though existent, played a very insignificant part. One of these societies is revealed by a petition presented to the state Senate on March 5, 1838.1 It was from a Native American Association in New York city, of which H. Hunt was president, with Abm. Tappen, J. P. Whitticar, Alexander Hamilton and John Bancker as vice-presidents.² It explains that "the vote of a native American, who has much at stake, with a better knowledge of our institutions, and a greater ability to decide upon the merits of candidates for office, is borne down and rendered nugatory by ignorant and lawless aliens, who, having little to gain and nothing to lose, are indifferent alike to the purity and permanence of our social and political institutions;" wherefore the association asks for a registry of voters. In April, 1838, a petition to Congress from citizens of New York city asked a change in naturalization laws, and in May following certain citizens of Kings county asked specifically for a law requiring aliens to reside twenty-one years before naturalization. This idea of twenty-one years' residence was destined to play a prominent part later as an idea of the Know-Nothing movement. During 1830 organized nativism showed itself again under the title of the Native American Association of New York City, which may or may not be the same body as that which

1 Senate Journal, 1838. Original in State Library. Jour. Congress.

existed in 1838. In May, 1839, this association petitioned the state Senate for a registry law to prevent election frauds in New York city. Despite the disappearance of political nativism, then, there remained nativist societies for at least two years longer, earnestly antagonistic to the foreign element. At the same time the anti-Catholic feeling aroused during the movement also persisted in the community, kept alive chiefly by the Protestant clergy.

Early in 1840 came the impulse which was to arouse nativism into new activity. Governor William H. Seward, being openly friendly toward the foreign element in New York state, saw fit to incorporate in his annual message of January, 1840, a brief paragraph about education. In this paragraph he stated that children of foreigners were often without the advantages of public education in consequence of racial or religious prejudice against them, and therefore he would recommend "the establishment of schools in which they may be instructed by teachers speaking the same language with themselves and professing the same faith." In New York city at this time there was a Catholic population of about 70,0003, supporting several schools without public aid. The public schools of the city were under the management of a society decidedly Protestant in its membership and ideas. In immediate response to Governor Seward's suggestion, the Catholics of New York city demanded a share of the school moneys for their own schools 4 and were at once opposed in the demand by the officers of the Public School Society. Twice during 1840 the Catholic request came before a Democratic common council and twice the application was rejected, but only after long debate and active canvasses that aroused bitter antagonism. Nativism again asserted itself in connection with the question. Anti-foreign and anti-Catholic

¹ Senate Journal, 1838.

² Senate Docs., 1840.

⁸ Kehoe, ii, pp. 459, 685.

⁴ Proc. Bd. Assis., 1840, February 17.

sentiment rallied behind the Public School Society as representing American ideas of undenominational education. It was a logical outcome of the struggle that political nativism should take on organization anew.

Directly after the fall election of 1840 a new paper of nativist character appeared, copying the name of its predecessor, the Spirit of '76.1 A meeting of native Americans also took place, but whether or not they succeeded in getting themselves organized is not clear. The movement was a feeble one and the daily press barely noticed it. With the early months of 1841 the Catholics carried their cause before the legislature at Albany and their former antagonists continued the contest in this new field. The struggle was still in progress when the New York city election of April came round and nativists were encouraged to build up a new nativist movement as an expression of public sentiment. This effort of theirs is very obscure. It was embodied in a Democratic American Association which nominated Samuel F. B. Morse for the mayoralty.3 In former years, when the New York city Whigs were a political minority, their leaders welcomed nativism as a force that would cripple the Democracy, but in 1841 the Whigs were strong and nativism was a menace to the local party. The dissension which sprang up in the new movement was said to have been fomented by Whig leaders.4 One faction of nativists repudiated Morse's nomination as irregular, while another faction vigorously confirmed its regularity. On the morning of election day a forged letter of withdrawal with Morse's signature appeared in the newspapers and when the polls closed he had received only 77 votes. The trick had scattered his friends.5 It seems hardly possible that the movement of 1841 could have been at all strong either in numbers or in organization.

¹ New Yorker, 1840, November 14. ² Herald, 1840, November 10.

Separately from the Democratic American Association, an entirely different organization was planned in the spring of 1841 and brought into existence after the city campaign was past. Its object, as it declared, was to unite all those who were "opposed to the perversion of the common school fund to sectarian purposes." The determined fight made by the Catholics seemed likely to continue for some time, although the legislature put aside their plea indefinitely in May. This new organization was intended to be the nucleus of opposition to Catholic plans. Organized on May 30, 1841, under the name of American Protestant Union, it chose as its president that well-tried nativist, Samuel F. B. Morse. Although semi-religious in nature, the Union was yet a legitimate part of political nativism. Its formally-adopted principles evidence this in these words:

Resolved, That we form ourselves into a national defensive society, and call on Protestants of all and every denomination of Christians, together with the friends of our institutions generally, to aid, assist and confirm us in this confederation for our common welfare.

Resolved, That this association shall be styled and known by the name of the American Protestant Union, the object of which shall be to preserve for ourselves and secure to posterity the religious, civil and political principles of our country, according to the spirit of our ancestors, as embodied and set forth in the Declaration of Independence and the federal Constitution.

The work for which the Union was organized came to hand when the local political parties took steps to present tickets for the fall election. New York city would choose at the November election two state senators and thirteen assemblymen, and the fate of Catholic requests would in large measure rest with these men. The Union accordingly roused itself, and began in October to ascertain the views of candidates. A considerable nativist sentiment in both of the great parties was inclined to lend aid to the opponents of Catholic wishes. In the Democratic Party the nominating committee drew upon itself the denunciation of an Irish-Catholic mass-meeting by favoring

* Observer, 1841, June 12.

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the friends of the Public School Society. In the Whig Party the anti-Catholic feeling was strong enough to force a certain pro-Catholic aspirant off the ticket and to place in the local platform a declaration against sectarian schools.3 The trend of events was toward nullifying Irish-Catholic influence just at the moment when it was most desirous of asserting itself. this emergency Bishop Hughes, as leader of the Irish-Catholic element, took an unexpected step by causing the nomination of a separate ticket by an Irish-Catholic mass-meeting.4 the "Carroll Hall ticket," so often referred to in later years. Apparently the bishop's purpose was to rebuke the Democratic leaders by showing that the Catholics held the balance of power in the politics of New York city. This at least was the interpretation put upon his act. The seguel was the immediate announcement, on November 1st, of a "Union ticket," made up on the bi-partisan principle. This tickets was selected by a committee of members of the Democratic American organization, acting under the auspices of the Protestant Union.6 It was hoped to unite the anti-Catholic sentiment upon the Union ticket and balance the Carroll Hall ticket. The brief campaign that followed these nominations was spirited. daily press, without exception, condemned the Catholic bishop for the action he had taken, but he held firmly to his course, protesting that he had not meddled with politics.7 On election day the strength of the several tickets was as follows;8

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Whig Party . . . . . . about 15,980 votes.

Democratic Party . . . . about 15,690 votes.

Catholic movement . . . about 2,200 votes.

Anti-Catholic movement . . . about 470 votes.

Anti-slavery movement . . . about 120 votes.
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⁸ Tribune, 1841, October 30.

⁶ Senators: Isaac L. Varian, Morris Franklin. Assemblymen: Horace St. John, David D. Field, Joseph Tucker, Edward Sanford, Linus W. Stevens, George G. Glasier, William Jones, David F. R. Jones, Elbridge G. Baldwin, William B. Maclay, Charles M. Graham, Jr., Solomon Townsend, Nathaniel G. Bradford.

Four. Commerce, 1841, November 3.

^{*} Kehoe, i, 666, * Tribune, 1841, November 12.

The vote seemed to prove that the Catholics held the Democratic organization at their mercy, for those nominees who had not received Catholic endorsement were defeated. The Union ticket received very inadequate support. Many nativists preferred to vote for the Whig nominees, who were known to favor the Public School Society.

The school question came up again before the next legislature and dragged along into the spring of 1842. The feeling against the Catholics still existed in New York city and showed itself in the political work and school-bill agitation that preceded the April election. No organized nativist movement showed itself, however, even when the Catholics again made a nomination of their own. The Protestant Union and Democratic American organizations were both invisible. tivists looked for aid to the local Whig Party rather than to independent action, and they were not disappointed. On the very day that the Whig governor signed a new school bill, as asked by the Catholic leaders, the Whig general committees of New York city officially declared their opposition to its provisions.^z The time had come, they said, to "manfully resist the misguided spirit of sectarian dictation which has sacrilegiously invaded our legislative halls." The local Whig organization became representative of nativism by this step. In the Democratic organization the leaders gave no recognition to nativist sentiment, but in several of the wards the Democracy split into two factions,2 one dominated by Irish-Catholics and the other by native-born voters. The old antipathies became outspoken and bitter while these changes went on. The excitement of election aggravated the feeling. After the polls were closed on election night the city streets were filled with a mob which drove before it the hated Irish, and stoned the windows of the Catholic bishop. Mayor Morris placed

¹ Com. Advertiser, 1842, April 11.

² Herald, 1842, April 14.

⁸ Comm. Advertiser, 1842, April 13.

militiamen on duty to guard the Catholic churches from violence.

The riot of April, 1842, was a final ebullition. Governor Seward had permitted the defeat of the Public School Society, and however bitterly nativists might resent his act, the new school law must be accepted. Henceforth the public schools of New York city were to be controlled by an elective board chosen in each successive June. At the first elections held in June, 1842, the opponents of Catholic ideas generally united in each ward on union tickets, regardless of old party lines. Organized nativism in this form scored a victory by capturing Nativism was now, as a result of the the school board. school struggle, a fixed sentiment in the community. In the fall of 1842 the Whig managers appealed to it for aid and met a willing response that seriously affected the Democratic ticket on election day.1 In the spring campaign of 1843, a published notice called upon all Americans to strike the names of foreigners from their ward tickets.' The same notice nominated Stephen Reed for mayor, but the official canvass of votes fails to mention him. The nativists were probably yet unorganized. The school board elections of June, 1843, showed a continued use of union tickets whereon Whigs and Democrats in single wards could co-operate against Catholic nominees.

The story of nativism in New York city has now been brought down to the summer of 1843, when a new political movement began, gaining strength from past experience and new conditions. It has been shown that nativism in New York was a complex sentiment based on underlying natural antipathies. Whenever this sentiment was affronted it rose into temporary self-assertion, but it found great difficulty in creating for its expression a political organization that could endure. Over and over again the movement was ab-

² Sun, 1843, April 11.



¹ Argus, 1842, November 16.

sorbed or checked by the timely interposition of the local leaders of the Whig Party. The constant effort of nativism to assert itself nevertheless developed the ideas for which it stood into definiteness, and taught Whig and Democratic voters to co-operate in their support. By its failures nativism had prepared the way for a real Native American party.

CHAPTER II

THE AMERICAN REPUBLICANS, 1843-1847

In the summer of 1843 the voters of New York city saw the beginning of a petty movement of nativism which gave no greater promise of vitality than had its predecessors in the field, but which nevertheless was destined to rise within two short years to the dignity of a national political party. The movement originated in the general disgust over the use made of political patronage by the local Democratic Party. nativism was dead in the spring of 1843, and when a new Democratic common council took power after the April election it showed its gratitude for foreign support by unusual favors in the way of market licenses and petty offices. This move created discontent.² Heretofore the markets had been under American control. Now the American meat-sellers found themselves provided with Irish competitors and subject to oversight by Irish clerks, weighers and watchmen. at once sprang into new life in the markets.

In June a political movement began. The first impulse toward it, so a later story ran, was a chance meeting of men in a blacksmith-shop and a comparison of grievances that brought about an agreement to organize. The association of the Eleventh ward, organized June 13, 1843, was the first body to be formed under the new impulse, but it soon had companion associations in other wards of the city and on July 15th a new paper, the *American Citisen*, appeared to voice the new designs. By August the several ward bodies had chosen del-

¹ Jour. Commerce, 1843, October 23; Tribune, 1844, April 15, August 24.

² Carroll, p. 264.

³ Tribune, 1843, July 17.

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egates to create a central organization for the movement. This whole process of development is an interesting example of American political work. When the delegates convened they adopted the name of American Republican Party and created a partisan machinery which was copied from that of the older parties. The control of the movement was vested in a general committee composed of delegates from the ward associations. The whole plan of party organization was embodied in a written constitution of nineteen articles. Partisan constitutions of the written sort are rare in American politics. This particular one was probably formulated to secure proper powers to the general committee. On August 26th the movement announced itself by an address to the voters.

All this work of organization, carried on quietly as it was, attracted so little attention that the daily press gave it no notice. The movement at first had really little of promise. Its opportunity came, however, in October, when a faction of Democrats opposed to Van Buren's leadership lost control of their party conventions and became openly disaffected.3 The nativist movement soon gained new members and experienced leaders. There began a rapid growth toward importance, marked interestingly by an increase of the nativist press. Meanwhile, the older parties looked on doubtfully, unable to judge from which of the greater organizations the new movement was drawing most heavily. As a rule the partisan press of the city preferred to say very little either in approval or disapproval of the movement until events made its nature clearer. The nativism of the American Republicans was frank and open. The party was very popular among the market-men. When it began to seek candidates it settled upon a pledge to be affirmed by each nominee who might be chosen. pledge 4 bound the nominee to four lines of effort if elected to

¹ Citisen, 1844, February 23.

Full text in Amer. Republic., 1844, July 11.

⁸Herald, 1843, October 4. ⁶ Jour. Commerce, 1843, October 23.

office, namely: to secure a law requiring twenty-one years residence for voters, to repeal the New York city school law, to oppose selection of foreigners for office, to accept no nomination from any other party. The last pledge was evidently intended to guard the movement from absorption by its rivals. At this campaign the work of nativism was done with aid of public meetings and political processions. It is worth while, perhaps to reproduce one of the party's campaign documents. It is the report of the committee on resolutions presented at a great mass-meeting in November, 1843. The doctrines expressed in it are substantially the same as those which afterward were put forth by the Know-Nothings.

Your Committee would respectfully report that the following are the principles and objects of the American Republican Party:

First. As to its organization, it is composed of members of both the political parties, irrespective of mere party considerations.

Second. That it is not intended, and will not be permitted, to discuss the merits of any of the candidates for the Presidency, and that with president-making, as a party, it has nothing to do. On the contrary, no person, by voting for the ticket offered by this party, is required or expected to go for any of the presidential candidates.

Third. That as a party it will discuss fearlessly the acts of all men and all parties that have in any way pursued such a system of policy as is deemed to be subversive of the fundamental principles of our government and destructive of public or private morality.

Fourth. That in the opinion of this party, based upon what appears to be very alarming fact, papal power is directly opposed in its end and aim to a republican form of government, inasmuch as the papist owes allegiance and fidelity to a power outside of our government—that is, to the Pope of Rome—and that power has been exercised in this city to such an extent that our common school system, by party subserviency, has been bartered away as a price for the votes of the organized followers of Bishop Hughes.

That through this school law there has been a pre-conceived determination, followed up by an actual attempt in the Fourth Ward, to put out of our schools the Protestant Bible, and to put down the whole Protestant religion as being sectarian.

That in addition to this the large majority of the offices in this city are in the hands and under the control of this dangerous influence, and consequently our city government in its detail is conducted by persons many of whom were but lately naturalized; all of which is contrary to every principle of justice and propriety,

1 Jour. Commerce, 1843, November 4.

and tends to the destruction of our schools, our religion, and our form of government.

That from the vast number of foreigners who are constantly coming to this country, it has become absolutely necessary to fix a longer period of residence before they shall be permitted to vote; that it is not intended to prevent any adopted citizen from voting who is now entitled to vote. If such abuse their trusts, it is their crime and our misfortune. All such are citizens, and of course no modification of the naturalization laws can affect them." It is deemed just and right that those foreigners who shall come here at a future period shall be permitted in taking the oath of allegiance, etc., to hold and convey real estate, and, in short, be citizens in all respects, saving and excepting the right of voting, and for this they shall remain 21 years. In this it is supposed every correct judging adopted citizen will cheerfully concur, as the only object proposed by it is that those who were not born in the United States, or who do not speak our language, or who do not read and cannot understand our laws and institutions, should not control by their votes the action of our government until they can vote understandingly. As it now is, those deluded men are, in a majority of cases, the mere instruments and dupes of designing politicians, who use them for their and our destruction.

In short, that in permitting the present connection between politics and religion, and the constant courting and buying the votes of these men to settle our elections, our city taxes have unnecessarily increased, until at the same time it is the fruitful source of many grades of crime. To bring about a reform in these enormous and constantly growing abuses is the sole object of this party. Therefore,

Resolved, That we cordially approve of the objects proposed, and that we will sustain the ticket nominated for this purpose, headed Mangle M. Quackenboss for Senstor

Resolved, That we are in favor of a repeal of the present school law, which was forced from our legislature under the dictation of papal influence. And that both the manner in which this law was passed and the objects intended to be gained by it, should meet with the united disapprobation of every good citizen.

Resolved, That we are in favor of a thorough and radical reform of the monstrous abuses that have obtained in our city government, and that we prefer to have our offices filled by American born citizens.

Resolved, That we are in favor of a modification of the present naturalization laws, so that 21 years residence shall be required of the future adopted citizens before giving them the right to vote.

Resolved, That in every particular, and throughout all time, we are in favor of an entire separation of religion and politics, and that we will put down the attempt that is making to unite them.

Resolved, That we call upon all good citizens to act as Americans, and to save themselves, their families and their country from impending destruction.

This report, besides declaring principles, gives a fairly good idea of the sort of organization which the nativists were trying



to create. It was to be local in aims, leaving its members to remain Whigs or Democrats on national issues. A feature not noted in the report was the fixed rule adopted by the new movement of distributing all nominations and appointments on the bi-partisan principle. In October, the movement took the American Citizen to be its official organ. Daniel F. Tiemann, as chairman of the city committee, was official head of the organization.2 Skillfully guided by experienced politicians, the movement met extraordinary success in organizing voters. The result was unexpected and startling to the managers of the older parties. Its ticket,3 though largely made up of new men, polled a splendid vote. Said the New York Tribune some months later, "The election came on, and to our utter amazement, this new party, which we supposed limited to a few disappointed office seekers and their personal friends, polled 8,500 votes out of a moderate aggregate poll."4 The actual party averages 5 were as follows:

Democratic Party						about 14,410 votes.
Whig Party						about 14,000 votes.
Nativist movement						about 8,690 votes.
Walsh Democrats						about 320 votes.
Anti-slavery movement						about 70 votes.

The movement did not, of course, elect any of its nominees, but the casting of such a large vote was a triumph in itself. The sudden rise of organized nativism was a general surprise. It was a phenomenal thing for a political movement to spring from nowhere and in five short months to build up party machinery that could organize voters by thousands. It was evi-

2 Ibid.

¹ Jour. Commerce, 1843, November 3.

³ Senator, Mangle M. Quackenboss; Sheriff, Charles Henry Hall; Clerk, Horace Loofborrow; Coroner, James C. Forrester; Assemblymen, William Taylor, Charles B. Childs, John Culver, Thomas H. Oakley, Uzziah Wenman, Charles Alden, Richard Reed, Valentine Silcocks, Jesse C. Wood, Jacob L. Fenn, Philo L. Mills, John B. Haring, Andrew McGown.

⁴ Tribune, 1844, August 24. ⁵ Jour. Commerce, 1843, November 22.

dent that its issues were viewed with responsive interest among the native voters of the city. In its personnel the movement was bi-partisan. It had apparently drawn upon the strength of the Democracy somewhat more heavily than upon that of the Whigs, but it left the relative positions of the two old parties the same as before its advent. A little more growth would give it control of the city. The Whig editor of the Tribune discussed the significance of the phenomenon. He was an uncompromising foe to anything that looked like political or social discrimination against the foreign element, but he admitted that there were real grievances to be redressed. such he cited the naturalization frauds, the appeals to the Irish and German vote, the violence done by foreigners at the polls and the greediness of foreigners for office. These had stirred nativism into life.

The managers of the new American Republican organization did not permit it to lapse into apathy after the fall election. They proposed to contest the city election of the following spring. The city committee was renewed, Alexander Copeland being made chairman and as such being official head of the move-The ward associations were spurred into new activity and used to circulate petitions for naturalization reform. Stimulated by this enthusiasm the movement spread beyond the Before the close of 1843 it was established in New Iersey and, early in 1844, in Pennsylvania.2 In preparation for the city election of 1844 a new issue was taken up. Reform was needed in the city administration at this particular time. Charges of extravagance, car elessness and inefficiency made against Democratic officials were generally believed true. was a taking issue for the nativist leaders and lay ready to their hand. When the nativists began to nominate ward tickets they accordingly pledged their nominees to both of their issues.3 Each nominee promised specifically to appoint

¹ Tribune, 1844, January 11.

² Citisen, 1844, February 2.

³ Tribune, 1844, April 4.

no foreigner to office, to make city appointments on a bi-partisan plan, to reform the police system and to reduce city expenses. The cry for city reform was made very prominent. The leaders had difficulty in settling on a mayoralty candidate who would be acceptable to all the diverse elements of their movement, but the mayoralty convention held repeated sessions on the matter and finally made a fortunate choice. On March 11, 1844, James Harper was nominated. He was a well-known business man, resident in the city for over thirty years, American by birth and descent, and interested in popular reforms generally. Though nominally a Whigh he had not been closely enough connected with party to be objectionable to Democratic nativists. A mass-convention promptly ratified the nomination. With this act the period of campaign preparation gave way to that of campaign work.

To those who guided their votes by the issues of the hour the prospect of nativism and reform in the city government gave promise of lighter taxes and better government. Harper's candidacy took well with such voters. Another source of strength was its pledge of bi-partisan appointments to office. Party workers on the Whig side could readily see a better prospect for themselves in the new party than in the old, and pressure was brought to bear upon Morris Franklin, the Whig nominee, to induce his withdrawal from the contest. Against this was exerted the influence of Seward and other leaders of the Whig state organization. The politics of presidential ambitions touched here upon the local issues of New York city. Among the state leaders of the Whigs were those who favored the ambitions of Henry Clay and who realized that an openly shown weakness of the Whig organization in New York city would be used as an argument by those opposed to the nomination of Clay for president.² The situation was an interesting evidence of the solidarity of American politics. A compromise was eventually reached between the city politicians and those

¹ Tribune, 1844, April 5.

² Argus, 1844, April 10.

of the state that made a way out of the difficulty. The Whig nominee remained before the people with the Whig organization nominally at his back. Coincidently the Whig press, either openly or tacitly, favored Harper's candidacy. This arrangement secured success for the nativist nominee. The opposition of the Democracy to Harper was vigorous. The need of city reform was candidly admitted by the party and promise of amendment made, but to nativism there was less concession. The foreign element was irritated by the enmity shown against it. Occasional petty street-fights took place between natives and Irish, and threats were made. Just before election the nativist city committee thought best to advise its voters to be unaggressive but yet "to maintain their legal rights at all hazards." By good fortune, however, the day passed without riot. The following vote was polled:

Nativist movement	•		•				about 24,510 votes.
Democratic Party							about 20,540 votes.
Whig Party							about 5,300 votes.

The nativists elected their mayor and the greater part of each branch of the Common Council. For the coming year they would have entire control of the city government. Their victory could not be questioned. The sources of the vote for Harper were discussed by party men with interest. An estimate by one of the daily papers figured its components at 14,100 Whigs, 9,700 Democrats and 600 new voters.³ The estimate was probably a fair one. A Democratic paper added the significant information that every Englishman and every Orangeman of the city voted the nativist ticket.⁴

Hardly had nativism in New York city reaped the fruits of its own good professions, when its prestige was rudely shaken by events in another state. The American Republican movement had taken root at Philadelphia and had grown on the

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1 Citizen, 1844, April 6.
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⁸ Jour. Commerce, 1844, April 12.

³ Amer. Repub., 1844, April 26. ⁴ Plebeian, 1844, April.

usual racial antipathies. Early in May, 1844, the entire country was shocked by news from the latter city that Americans and Irish had come into conflict, that Americans had been murdered, and that a frenzied mob had hunted Irishmen by the light of burning homes and churches. A wave of excitement swept over New York city, where foreigners and natives eyed each other with open and intense distrust. Mutterings of riot voiced themselves. The conservative leaders hastily took the initiative in action. The nativist organization started a committee for Philadelphia, and called upon its voters to be calm until the truth were known. Bishop Hughes exerted his authority to quell the restless Irish. Mayor Harper arranged for suppression of riot at its first appearance. In a few days the crisis was past and the public settled down with evident relief. The Philadelphia riots nevertheless lost much sympathy to the cause of nativism and their occurrence was deeply regretted. So far as the repute of local nativism was concerned. its leaders had no cause for shame. The men whom the new movement carried into office were honest and sincere. pledges of nativism were carried out, and foreigners disappeared from the city pay-rolls along with the politicians who had put them there.

The nativist movement had by this time extended itself into the rural counties near New York city, more especially those where the foreign element had found a lodgment. Aided by disaffected politicians and stimulated by nativist and anti-Catholic literature the movement was quite promising. By March, 1844, it existed in nearly all the south-eastern counties and at Albany as well. In Brooklyn the nativists nominated a mayor and polled twenty-six per cent. of the total vote. In Ulster county there was a nativist paper. It was all in natural sequence, then, when the general committee of New York city issued a call on June 21st for a state convention of nativist delegates.¹ The plans of the nativist leaders

1 Amer. Repub., 1844, June 26.

had now assumed a wider scope. They would create a state organization. The relation of their action to the presidential campaign is, unfortunately, not at all clear. city committee at New York, once committed to the policy of a state party, made earnest efforts to carry it out. In August it sent out official organizers into the counties. There were protests made to it against nominations for Congress on the ground that nativist nominees could not preserve that neutrality on national issues which the organization had thus far maintained. All arguments were overruled. The first nativist state convention met at Utica on September 10, 1844, in response to the committee's call.2 The great question which filled the time of this body was that of naming an American Republican state ticket. The idea had its friends and its opponents, both eagerly interested. At the session of September 10th the question was deferred to a later convention at New York city on September 23d and on the latter date nominations were defeated.3 Reports of the convention sessions say nothing of the appointment of a state committee. The effort in 1844 to expand political nativism into a state party was only a partial success. In Kings and Richmond counties there seem to have been nativist county organizations. In Ulster county there was one which absorbed the Whig Party entirely.4 Yet, taken all in all, the expansion movement up to the November election had the aspect of a failure.

In New York city the political work of 1844 was more successful. Out in the state at large political nativism was a mirage, but in the metropolis it was a concrete fact. The effect of Harper's election in April, 1844, by a combination of nativists and Whigs, had been to resurrect the old alliance which had proven fatal to nativism in the movement of 1835. The affinity between the local nativist movement and the local

¹ Amer. Repub., 1844, August 9. ² Amer. Repub., 1844, September.

^{*} Ibid. * Tribune, 1844, November 13.

Whig Party again stood revealed as the presidential campaign of 1844 began. The state leaders of the Whig Party had no approval for nativism. Seward vigorously denounced the movement by speech and letter. Despite all this, there was a drawing together of interests in the city. In September a new general committee took control of the American Republican movement and John Lloyd was chosen to succeed Copeland as official head of the party. The regular conventions were duly held and nominations made.2 Behind this routine of party work the secret work of political intrigue went on. The Whig organization also made its customary nominations, but its leaders joined in negotiations with the nativists, of which the end was an understanding that the Whig managers should throw Whig support to the nativist local ticket, while the nativist managers should aid the Clay presidential ticket.3 The agreement was at once made apparent by the action of the Whig press. All the Whig papers, with one exception, lent friendly aid to the nativist canvass henceforth. The Democratic press was quick to make capital of the new alliance. In New York city the Democratic nativists were ceaselessly told that the American Republican movement was a Whig annex. from which all real Democrats should break loose. In the interior counties the foreign-born Whigs were assured that the Whig Party had adopted nativism and was secretly their enemy.4 Those Whigs whose interests were linked with those of Seward and Weed, chafed under the infliction, but conditions could not be changed in New York city. The terms of alliance must be carried out. Nativism, in its part, went on its way happily. At mass-meeting and in party press the now

¹ Amer. Repub., 1844, September 21.

² Senator, George Folsom; Assemblymen, Abraham G. Thompson, Jr., John Culver, James Jarvis, William S. Ross, Severn D. Moulton, Eli C. Blake, Harvey Hunt, Thomas H. Oakley, Jacob L. Fenn, David E. Wheeler, Frederick E. Mather, Roderick N. Morrison, John J. R. Depuy.

³ Tribune, 1846, August 27.

⁴ Tribune, 1844, November 11; 1846, October 10.

familiar anti-foreign and anti-Catholic arguments were urged upon the people with a careful avoidance of national issues.¹ The work of political nativism was becoming systematic. The movement was now conscious of holding strength.

The agreement between political leaders in regard to the presidential vote in the metropolis was carried out by the managers of nativism so far as they were able, but the movement was not wholly under their personal control. The Democratic wing of the organization had no friendship for Henry Clay. As election approached there were hints of action by the friends of Polk and hints were translated into actuality by a mass-meeting of Democratic nativists, on October 31st, to endorse Polk's candidacy against Clay.2 Eventually the day of election came. The Whig city committee, faithful to its bargain, printed nativist ballots and distributed them to Whig voters through the regular party workers at the polls.* Everywhere in the city the Whig strength went to aid the American Republican nominees. Horace Greeley of the Tribune, though an avowed and steadfast enemy to nativism, cast a nativist ballot as evidence of his loyalty to party policy. The hopes of Whigs for Clay's success were blasted, however, when the returns from the state came in. New York state had gone Democratic. In New York city, where the Whig and nativist alliance had done its work, the votes of Whigs had carried the nativist local ticket to victory, but 2000 Demogratic nativists had voted for Polk, and carried the city for him against the Clay ticket. The party averages on assembly ticket were as follows: 4

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Nativist movement . . . . . . . . . about 27,440 votes.

Democratic Party . . . . . . . about 26,230 votes.

Whig Party . . . . . . . . about 950 votes.

Agrarian movement b . . . . . . . . about 90 votes.

Anti-slavery movement . . . . . . about 70 votes.
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¹Official Address in Amer. Repub., 1844, September 6.

² Jour. Commerce, 1844, November 1. 3 Tribune, 1846, April 6, August 27.

¹ Tribune, 1844, November 25.

Nativism was gaining new force with each successive election. Its vote was greater at this occasion than it had ever been before. A state senator and fifteen assemblymen would represent nativism in the next state legislature, and four congressmen would present its issues before the next Congress, all as a result of the campaign of 1844. Usually in a presidential year it was the fate of lesser political organizations to be crushed between the two great national parties, but the American Republican movement had reaped only profit from adverse conditions.

If the result of the campaign was pleasant to nativist leaders it was the exact reverse to the Whig managers. In city and in state the campaign was a Whig disaster. In New York, Kings and Ulster counties the party had been absorbed by the organized movement of nativism. All over the state as soon as the pressure of presidential politics was removed there were evidences of Whig friendliness for nativism. Whig papers in Albany, Rochester and Buffalo commented with favor upon it. These hints of approval came more especially, perhaps, from that element of the party which opposed the political leadership of Seward and Weed. Upon the surface of affairs it looked for a time as if the Whig Party in New York state would be weakened by a wholesale secession from its ranks toward the new American Republican Party.' The Seward wing of the party now made an onslaught against the hostile influence. The popularity of Henry Clay made his loss of New York state by a small margin a source of chagrin for the Whig masses, for the vote of New York would have been decisive. It was possible to ascribe this loss with equal plausibility either to the anti-slavery movement in the counties or to the nativist movement in the metropolis. The Seward men preferred to ascribe it to the latter, and the New York Tribune explained to its readers that the Whig Party had lost most se-

¹ Argus, 1844, December 20.

² Argus, 1844, November 30.

verely in those localities where the foreign element had gathered, and where foreign-born Whigs had been frightened away from Clay by the fear of nativism.' It was only grudgingly acknowledged that the Clay ticket gained heavily in New York city as a result of nativist aid. When opportunity permitted, the attack upon nativism took another form. The Whig city committee at New York was usually renewed at the beginning of each year. In the primaries after the presidential election the Seward men secured control of the city committee, and the machinery of the party was, from that time on, used to crush out political nativism. The organization of the Whig committee for 1845 was the turning-point in the fortunes of the nativist party in New York state. On February 11, 1845. there was issued a declaration of policy by the Whig committee.* Of the fifteen resolutions, nearly half were more or less in condemnation of the policy of alliance which previous city committees had followed. The new committee declared emphatically that it recognized no distinctions between citizens on the score of religious faith or place of nativity. committee's declaration was a formal notice to the public that the old alliance was broken, and that the erstwhile allies would henceforth go their separate ways.

The American Republican organization now faced a contest where it must rely upon itself alone. The elections of April, 1845, would be a test of its ability to control the city by unaided effort. The outlook was by no means discouraging. Nativism had made a record of honest city government. It had control of the city patronage, and it was backed by a vigorous anti-foreign sentiment. The local Whig Party was divided, and a goodly portion of it, which was nativist in sympathies, could be relied upon to support nativist nominees. The organ of the Whig city committee was the *Tribune*. In its columns Whigs were urged to rally round the party name,

¹ Tribune, 1844, November 11.

² Tribune, 1846, October 10.

^{*} Tribune, 1845, February 13.

regardless of the question of success at the polls. The local Whig organization took its position most frankly. It put aside for the time all expectations of carrying the election, in order to wage a desperate struggle for continued existence as a party. It was willing to put the Democracy in control rather than see the city patronage go to the nativists for another year.1 In the party convention the anti-nativist managers had to struggle to maintain their policy, but they succeeded. re-nomination of Harper for the mayoralty by the nativists on February 18th preceded the Whig city convention, and when the latter body met there was a strong feeling for the endorsement of Harper's candidacy.3 Such action would, of course, have revived the old alliance which the Seward men had broken. The effort was foiled, and Dudley Selden was set up as the regular nominee of the party. The Whig organization went before the people with a nominee whom it could not elect, and with no motive except that of giving a death-blow to political nativism. The action was followed by open disaffection on the part of the minority faction.

The city campaign, as might be expected, was a warmly contested battle. Several of the Whig newspapers bolted the regular nominee and declared for Harper. It was not forgotten that Selden was very recently a professed Democrat, while Harper had been a life-long Whig. The columns of the Tribune went straight to the point of the real issue. All over the state, they said, the local leaders of the Whig Party were watching the fight, and the continuance of the party in the state would hinge on the result in New York city.³ The Whig members of the legislature, it was said at another time, "deeply feel that the overthrow of the native party is essential to a renewal of the struggle for Whig ascendency in our state with any hope of success." A great deal was said during the city campaign in regard to the success of nativist

¹ Tribune, 1845, February 18.

² Post, 1845, February 22.

^{*} Tribune, 1845, March 15.

⁴ Tribune, 1845, March 31.

efforts at economy in city administration, but the real question of the day was the ability of political nativism to resist the crushing attack which was being made upon it by both of the older parties. The April election finally ended the contest. The vote stood as follows:

Democratic Party	•		•			•	about 24,210 votes.
Nativist movement							about 17,480 votes.
Whig Party							about 7,030 votes.
Agrarian movement .					•		about 120 votes.
Anti-slavery movement							about 70 votes.

The Democracy elected the mayor and common council. The Whigs secured some seats in the common council. The nativists succeeded in electing, out of the whole array of city and ward nominations, only one man, a ward constable.* It was as complete an overthrow as the most bitter Whig could have hoped. At the same time the size of the nativist vote showed that its defeat was by no means conclusive. The movement had received a set-back, but it was not crushed.

While the nativist leaders in New York city had been carrying on their local campaign they were also connecting themselves with efforts to organize a national political party devoted to the nativist issue. The American Republican movement, after spreading into New Jersey and Pennsylvania, had assumed in those states the name of Native American Party. During 1844 the movement spread from New York into South Carolina, Massachusetts and Connecticut, while from Philadelphia it spread into Delaware, Maryland and some of the states farther west. By the end of 1844 an agitation had begun for a national convention and in time one was called to meet at Philadelphia on July 4, 1845. In April, 1845, the nativists estimated their own strength to include 48,000 in New York, 42,000 in Pennsylvania, 14,000 in Massa-

4 Ibid.

¹ Valentine Manual, 1845-46.

² Courier Enquirer, 1845, April 9.

⁸ Amer. Repub., 1844, June 7, July 13.

chusetts, 3,000 in New Jersey, 1,000 in Delaware and 2,000 in other states, making a total of 110,000 votes.* Its strength in New York state was reckoned at 18,000 in the city and 30,000 outside the city. The American Republican associations of New York city viewed the new idea of national organization with approval, notwithstanding that it ran counter to their previous plan of avoiding national issues. In June, 1845, delegates were chosen to the national meeting at Philadelphia. The existence of the national Native American Party began I with the convention of July 4, 1845. There were present 141 delegates, representing fourteen states.² One of the vicepresidents, Loring D. Chapin, and two of its secretaries, were taken from the New York delegation. It was the hope of the New York men to fix upon the new party the name of American Republican, under which the nativist movement still worked in New York state; but they were outvoted by those states where the name of Native American was in use.3 sides adopting a name for the new national party, the Philadelphia convention issued a platform and address. The question of a presidential ticket was also discussed at the session. Altogether the Philadelphia gathering evolved an ambitious programme for the new party. Though now very weak indeed as a party, yet only a span of two years lay between the gossip of the smithy, where the movement started, and the convention work of 1845. Two years more might bring an equal The work of the convention was promptly ratified by the New York nativists at a mass-convention of July 18, 1845.4 In giving its adhesion to the national party, the New York organization was obliged to assume the new party name. but some of the ward associations kept the old name of American Republicans.

¹ Quoted from Philadelphia Sun by Roch. Amer., 1845, April 26.

² Convention accounts in Orr, also Lee, also Jour. Commerce, 1845, July 7.

² Argus, 1845, July 9.

⁴ Jour. Commerce, 1845, July 19.

It was in New York city alone that political nativism could really pose as a leading issue, and here, as the fall election of 1845 came on, its leaders again prepared to contest the field with the older parties. They had suffered a blow by the drawing away of Whig support, but their heavy vote at the spring election in the very face of that withdrawal was an evidence of endurance fit to base strong hopes upon. Late in September the nativists held their usual conventions to place nominees in the field. The new general committee chose William L. Prall as chairman. On the Whig side a harmonizing of the local factions brought all the Whig press back to the support of the regular ticket, restoring the apparent unity of the party. Then followed a quiet but active effort on both sides to secure for nativist nominees the vacillating vote of Whigs who sympathized with nativism. Just before election a temperance ticket appeared, made up of Whig and nativist It was said to be a device to meet the needs of nominees. those whose sympathies were divided,2 but if so it found little favor. In general, the line of separation between Whig and nativist forces was well-defined. Partisan Whigs turned back to the regular organization and left nativism to its own natural strength. The party averages on the assembly ticket were as follows:3

Democratic Party						about 16,550 votes.
Whig Party						about 11,280 votes.
Nativist movement						about 8,750 votes.
Agrarian movement .						about 530 votes.
Temperance movement						about 320 votes.
Anti-slavery movement						about ? votes.

¹ Senator, Elias H. Ely; Register, Joseph Husty; Assemblymen, William S. Ross, James Stokes, Abraham G. Thompson, Jr., Thomas H. Oakley, Harvey Hunt, Nehemiah Miller, William Marks, John A. King, Alonzo A. Alvord, Harris Wilson, Henry Meigs, Alfred S. Livingston, Peter Doig.

² Herald, 1845, November 4. ⁸ Tribune, 1845, November 7.

⁴The anti-slavery men had a ticket before the people but their small vote was ignored by the press reports of election.

The election showed the important fact that the actual strength of nativism in the past two years had not been gaining. Its apparent gains had been caused by the aid of voters whose attachment to the Whig Party could not be made secondary. The election cast a shadow over the movement. From this time onward the nativist party in New York was recognized as on the wane.

In due time the spring campaign of 1846 came. The nativist mayoralty convention offered their nomination to Robert Taylor, who refused it. Thereupon a small section of the party split off as a city-reform movement and obtained an acceptance from Taylor. Behind this affair can be dimly seen the features of a scheme to combine again the issues of reform and nativism as had been done in 1844. Had the nativists followed with an endorsement of Taylor; the plan might have had a trial, but the nativist leaders negatived it by announcing a distinct ticket, with William B. Cozzens for mayor. At the city convention this year the usual long party platform did not appear. The resolutions as adopted merely approved the idea of municipal reform and declared the motive of the nominations. On this latter point the resolution was significant:

Resolved, That we are further impelled to place our candidates before the people by a desire to preserve our distinct political organization, conscious that we look in vain to the old parties for any effective aid in carrying out the great principles of the Native American Party. It becomes our duty to present ourselves at every election before the people, confident that in the frequent discussion of our principles, which are eternal as Truth itself, the truth will ultimately prevail.

This resolution was an acknowledgment that nativism was no longer a political power. Those who believed in its principles, nevertheless, voted its ticket at the regular election. The city-reform group which had split off from the party to nominate Taylor was absorbed by the Whig Party when the

⁸ Mayor, William B. Cozzens; Almshouse Comm'r, Abraham B. Rich.

⁴ Herald, 1846, March 27.

Whig convention took Taylor as its nominee. The party vote on the mayoralty was as follows:

Democratic Party .		•	•	•	•	•	•	•	•	•	about 22,240 votes.
Whig Party											about 15,260 votes.
Nativist movement.											about 8,370 votes.
Agrarian movement											about 710 votes.

The next trial of nativism was at the election held in May, 1846, to choose delegates to a constitutional convention for the state. Each political organization of the day had its pet schemes of reform to be advanced, and the nativist organization with the rest. The Native Americans nominated a full ticket of delegates, and four of its nominees were taken up by the Whigs. At the election a very light vote was cast, and the Democracy was able to carry the field. The only result of the election, for nativism, was a further exposure of its growing weakness. The averages on the various tickets were as follows:

Democratic Party				•		about 17,630 votes.
Whig Party						about 8,610 votes.
Nativist movement						about 4,600 votes.
Independent movement						about 1,480 votes.
Agrarian movement .						about 700 votes.
Anti-slavery movement						about ? votes.

The decline of the Native American Party in New York was probably retarded by the knowledge that the party was acquiring a strong position in Pennsylvania, where it had developed a state organization. Encouraged possibly by this, the nativists of New York also endeavored in 1846 to create a state organization. The city committee of New York led the work by calling a state convention,³ and sending an organizer into

¹ Delegates: Ogden Edwards, Shepherd Knapp, Hiram Ketchum, Elias H. Ely, John Leveridge, Lora Nash, David E. Wheeler, Burtis Skidmore, Harris Wilson, William L. Prall, John Lloyd, Jacob Townsend, Nicholas Schureman, Minard Lefevre, William S. Ross, William Pratt.

² Tribune, 1846, May 11.

³ Poughkeepsie Amer., 1846, February 14.

the counties. On August 19, 1846, delegates from a number of points in the state met at Utica to organize the convention. This was the year for election of a governor. The convention accordingly nominated a state ticket and created a state committee. The head of their ticket was Edward C. Delevan, of Saratoga, who was widely known for his temperance views, but had not been identified with the nativist movement. Delevan declined the place, and the nativist ticket remained headless until early in October, when the state committee filled the vacancy. In its final form the state ticket of 1846 was as follows:

Governor Ogden Edwards of Kings.

Lieut.-Governor George Folsom of New York.

Canal Commiss'r Robert C. Russell of Albany.

Canal Commiss'r James Silsbee of Steuben.

The executive work of the campaign fell into the control of the new state committee, composed as follows: William L. Prall, Lora Nash, Minard Lefevre, Andrew Thompson, Calvin Pollard, all of New York; Robert H. Shannon and Daniel Talmage, of Kings; Jacob Y. Lansing and Robert C. Russell, of Albany; Henry I. Seaman, of Richmond; Edward Prime, of Westchester; Albert G. Travis, of Putnam; Augustus T. Cowman, of Dutchess; J. Young, of Ulster; Andrew Hanna, of Oneida. The effort of the Native Americans to pose as a state party was so futile that they received very little attention in the campaign. Their strength lay almost entirely in New York, Kings and Dutchess, and even here they could do little beyond announce themselves. The entire vote on the state ticket in the fall of 1846 was less than two per cent. of the state aggregate. It averaged 6170 votes.

¹ Poughkeepsie Amer., 1846, August 29.

² Tribune, 1846, August 26.

Poughkeepsie Amer., 1846, September 12.

⁴ Tribune, 1846, December 5.

In New York city the regular fall campaign for the Native American ticket 1 brought dissension and cross-purposes among the leaders. An arrangement was made to exchange support with the Whigs on certain offices, but an outcry against it upset the arrangement after it had been completed. Even those who had so far remained faithful to the movement dropped away when charges of double-dealing became rife. The poll at the November election showed a serious loss of strength. Following were the averages:3

Democratic Party						about 20,970 votes.
Whig Party						about 18,270 votes.
Nativist movement						about 4,210 votes.
Agrarian movement ,						about 210 votes.
Anti-slavery movement						about ? votes.

The nativist party was now near its end. As the spring election of 1847 drew near the party made its last stand. In March a city convention named a ticket. In several wards there were also nativist nominees to the common council. The April election resulted in the success of the Whig city ticket by a narrow plurality, and it was claimed with apparent truth that the victory was owed partly to nativist votes. Whig support of nativist ward tickets had been accepted in exchange for nativist support of the Whig city ticket. In actual numbers the Native Americans were still dwindling. The poll on the mayoralty in April, 1847, was as follows:

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Whig Party . . . . . . about 21,310 votes.

Democratic Party . . . . about 19,680 votes.

Nativist movement . . . . about 2,080 votes.

Agrarian movement . . . . about 300 votes.
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¹ Sheriff, Charles Devoe; Clerk, Willis Hall; Coroner, John B. Helme; Assemblymen: Uzziah Wenman, Thomas H. Oakley, Joseph W. Kellogg, Edward Prince, William S. Ross, James B. Demarest, Thomas R. Whitney, Edward A. Frazer, Cornwell S. Roe, Philip Jordan, John D. Westlake, William R. Taylor, Charles E. Freeman, Joel Kelly, Benjamin Sherwood, Charles Roberts.

² Tribune, 1846, November 3. ³ Tribune, 1846, November 24.

⁶ Mayor, Elias G. Drake; Almshouse Comm'r, John Lloyd.

⁸ Herald, 1847, April 18.

After the election the organized nativist party went out of existence in New York. The general city committee existed as late as September 13, 1847, still headed by William L. Prall.² In the natural course of events a new committee would have been formed at this time, but probably none was named. The official organ of the movement announced its own death in September. Before the organization had passed away its leaders had opportunity to take part in the second national convention of political nativism. That body met first on May 4. 1847, at Pittsburgh and soon adjourned to a second session on September 10th at Philadelphia. Of the eleven state delegations which appeared the largest was that of New York with its thirty-nine members. The work of the convention consisted in making a platform and recommending names for the national offices. It so recommended Zachary Taylor for the presidency and Henry Dearborn for the vice-presidency, but its work ended there. It did not organize a separate national campaign.

In New York state the American Republican or Native American movement cannot be called at all successful.² Such triumphs as it won in the chief city were built on the votes of men who were not nativists in sympathy. Unimportant in itself as it is, the movement of 1843-47 is yet to be noticed as preparing the way for the rise of the nativist secret societies by diffusing nativist feeling through the community. It developed also a political precedent for the more successful movement of a few years later. Before political nativism reached its passing eclipse in 1847 the Order of United Americans, with 2000 members claimed, was on the scene as a social force with political leanings. It was the mission of this Order to shelter the upgrowth of the mysterious society of the Know-Nothings and to carry nativism in New York over the gap that lay between the eclipse of effort in 1847 and the revival of effort in 1852.

¹ Gasette-Times, 1847, September 13.

² General sketches of this movement are in *Herald*, 1854, May 29, June 20.

CHAPTER III

RISE OF THE SECRET SOCIETIES, 1844-1852

THE collapse of the Native American movement, in the fall of 1847, left open the field to the efforts of a new sort of organization, the nativist secret society, the first appearance of which had come in 1844. There were at this time a considerable number of secret societies of various natures existing in New York state. They were voluntary associations, whose members were bound together by oaths of secrecy and brotherhood and whose proceedings were dignified by formal set cere-Earlier in the century, during the anti-masonic movement, public opinion had turned against secret associations and nearly crushed them out of existence, but as the years went by there was a gradual revival of their prestige. Oddfellowship and freemasonry regained importance and the tentative experiments toward new societies brought the Red Men and Good Fellows into existence. From England came also the Druids and the Foresters. These earlier secret societies were mainly benevolent associations, but in the decade of the forties, as the American genius for organization asserted itself on this new field, the social movements of the time began to model new secret societies after those already established and to use them for purposes of agitation. It had become recognized by this time that the charm of secrecy and the discipline of the lodge-room could lend new strength to any organization which might seek their aid. The temperance movement was the first to take up this idea, and there were founded several societies, using the familiar machinery of the older fraternities but devoted to the inculcation of hostility to liquor-[260

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drinking. The nativist sentiment seems to have been second to seize upon secret society methods, and it, too, was shortly embodied in a number of organizations, separate in identity but with the common idea of hostility to foreign influence. After nativism, other social ideas took up the secret society model, bringing a swarm of new associations before the public eve. There was nothing abnormal, then, in the mere fact that secret societies came into existence with nativist principles at their basis. After a time nevertheless the nativist societies developed a feature which their older models had not ventured upon. They began to use their secret machinery to organize political effort. This might fairly be called an abnormal step. None of the other secret organizations had pretended to do more than agitate and mould public opinion, but nativist bodies advanced to the point of marshaling voters in support of the ideas for which the societies were working. This was not intended by the founders of that society which first developed the system, but the peculiar semi-political character of nativism itself brought about the change. Point by point the evolution of secret political work may be traced in the history of the two great secret organizations, which were types of political nativism in action. The earlier of the two was the Order of United Americans, which created the system of secret poli-The second was the so-called Know-Nothing Order, which took up and further developed the system into a great national organization. Not all the nativist societies were political in action, however. Several held themselves strictly to the mere inculcation of principles. The importance of these nonpolitical bodies in relation to political nativism lies in the fact that they helped to shape that sentiment which turned to politics as a mode of making its ideas felt in the community. The lessons heard in the lodge-room were remembered at the polls. The growth of nativism, in the city of New York especially, during the rise of the Know-Nothing movement, cannot be properly understood without reference to the existence and workings of these secret bodies, political and non-political.

The Native Sons of America seems to have been the first of the nativist social societies in New York state, but it may not have been a secret one. It was organized in New York city, December 18, 1844, with James Webb as president. There appears to be no further reference to it in the press and it was probably short-lived.

The American Brotherhood was organized in New York city on December 21, 1844. Its founder was Russell C. Root. The annals of the society tell of an informal meeting for discussion on December 16th and of a formal one for organization on December 21st. Of the thirteen or fourteen men who did the work nearly all had taken some part in American Republican politics. The new society therefore took its impulse from the political nativism of 1844 and inherited some of its traditions. On December 28th, when officers were installed, John Harper became official head of the society. A week later the name of the society was changed to that of the Order of United Americans, and as such its growth went on. The character of the Brotherhood may be seen from its formal resolution of organization, worded as follows:

Resolved, That this meeting form themselves into an association to be called the American Brotherhood, for the purpose of mutual aid and assistance, and to oppose foreign influence in our institutions or government in any shape in which it may be presented to us.

The United Daughters of America was a patriotic society of women which was organized in New York city on November 27, 1845.⁴ Nominally it was independent of other societies, but in effect it was an auxiliary to the Order of United Americans. It could not, of course, be political, but it may be reckoned as one of the aids in the maintenance of nativist sentiment. At its best period it included about ten chapters

¹ Amer. Repub., 1844, December 20.

² O. U. A., 1848, November 18; also Whitney, p. 261; also Carroll, p. 252.

Baldwin Coll. 4 Ibid.

organized under the supervision of a grand-chancery. When the failure of the nativist political movement in 1857 brought a reaction against nativist societies this one suffered, but a nominal existence of its grand-chancery was kept as late as 1861.

The Order of United American Mechanics originated in Pennsylvania and was at first a benefit society for workingmen. Introduced into New York state by the creation of a council in Brooklyn on July 8, 1848,* it slowly extended to other cities. The organization of a state-council followed and under its supervision the number of councils in the state rose to about thirty. Few of these were in the metropolis. strength of the society lay chiefly in the towns of the Hudson valley where the nativist political movement had prepared the way for it. Membership was restricted to Americans-born and the conditions of the time brought it into the current of nativist feeling. It was never, perhaps, engaged in political effort, but its teachings lay in the direction of maintaining American traditions and its councils were accustomed to appear on public occasions in company with bodies of more pronounced nativist aims. With the downfall of the Know-Nothing movement the society lost its strength and its statecouncil disbanded. In later years it again secured a foothold and still exists.

The Order of the Star-Spangled Banner was founded³ in New York city in the spring of 1850, but it may possibly not have borne this name in its earlier years. It seems also to

¹ N. Y. City Directory, 1861.

² Date supplied by State Secretary.

³ On the origin of the society the best account seems to be in N. Y. Herald, 1854, December 20, p. 1; See also Whitney, p. 280. Various other accounts, unreliable as a whole, yet give additional facts, e. g., N. Y. Tribune, 1855, May 29, p. 5. Allen is referred to as founder in N. Y. Tribune, 1854, November 27, p. 4, and in N. Y. Times, 1855, May 29, p. 1, October 18, p. 8. For scattered facts, see N. Y. Times, 1854, October 10, p. 2; N. Y. Tribune, 1855, June 4, p. 5; N. Y. Herald, 1855, July 29, p. 4; Carroll, p. 267.

have taken to itself the name of Order of the Sons of the Sires of '76. Its founder was Charles B. Allen, of whom, since he was not in politics, the contemporary press says little in personal reference. Drawing together a few friends he organized them under a pledge of secrecy into a nativist society. journeyman printer, William L. Bradbury, was first president of the group, but died in office after a few months. founder himself then became official head. In its aims the new organization was wholly political and in its principles strongly nativist. Its policy was to influence local politics by concerted action of its members in favor of such nominees as might be selected from the tickets of political parties, such nominees being Protestant and American-born. Along this line the little group acted at successive elections, but so small was its membership that its influence was unnoticeable. The business sessions of the society were held here and there at the homes of its members during this period. It seems to have lacked energetic management and its membership was almost stationary. For two years, nevertheless, it kept a feeble existence. In 1852 a few active spirits from the Order of United Americans found their way into the society. At the time of their advent it had only forty-three members all told, still meeting as a single body. There seems now to have been a revolution within the society the details of which are unrecorded. The society was reorganized, the founder was displaced and new men took control.* The new president was an energetic nativist who had formerly been a Methodist preacher. This reorganization probably occurred April 4, 1852.3 Under the new leaders the society began to expand. As its membership grew larger the meetings in private houses ceased and sessions were held in-

⁸ Whitney, p. 280.

² These changes are very obscure. See *Herald*, 1854, December 20, p. 1; *Tribune*, 1855, May 29, p. 5, also Carroll, p. 269.

^{*} Whitney, p. 284.

stead in various lodge-rooms hired for the purpose when The society was divided up into several wardcouncils or wigwams under the supervision of the eldest body. the president of which was ex-officio head of the whole society. There was disapproval, however, of the control of the men who had grasped power. Disaffection showed itself and culminated in a secession, either in 1852 or 1853, of a minority group led by Allen, the founder. The malcontents formed a grand council of their own and made a new ritual of three degrees. The society thus broke into two parts each one claiming identity with the original unity. All this time its existence was unknown to the general public. During 1852 the society was rapidly recruited in membership. The politically-inclined element of the Order of United Americans was especially attracted to it. Its councils grew so large in some wards that meetings had to be held in large halls, but the element of deepest secrecy was carefully preserved. Its members did not speak of its existence to those not initiated. The society probably co-operated with the Order of United Americans in the political efforts of the fall of 1852. In the fall of 1853 it was able to make a still more decided stand in politics, and then for the first time its existence began to be generally known. In default of a better name it was dubbed the "Know-Nothing Order" by an interested public, and under that name the Order of the Star-Spangled Banner thenceforth pursued its career.

The Order of Sons of America was organized in Philadelphia late in 1844 and had a history in Pennsylvania much the same as that of the Order of United Americans in New York state. Several efforts were made to secure a union of the two orders. One of these went so far as to organize a camp of the Sons of America in New York city in 1852 under the auspices

¹ Herald, 1854, December 20, p. 1; 1855, July 29, p. 4; also Tribune, 1855, May 29, p. 5, June 4, p. 5; also Carroll, p. 269.

of the United Americans. This body was kept alive at least two years but the contemplated union did not come about and the camp was allowed to die.

The Benevolent Order of Bereans, unlike the preceding societies, was made up largely of foreign-born citizens. Reference has been made to the antipathy that existed between Protestant and Catholic Irishmen. The former were usually called "Orangemen," although the Orange Institution was not then organized in America. The Berean Order drew its membership from this class.³ It was organized in New York city in 1844 or 1845 in bodies called assemblies which were federated under a grand council. The anti-Catholic ideas of the order made its members earnest allies of nativism despite their foreign birth, and they became strong upholders of American ideas. In 1853 the order had at least eight assemblies,⁴ but in 1854 it disappeared and was probably absorbed by the American Protestant Association.

The American Protestant Association was founded in Pennsylvania as a secret beneficial society, and became established in New York by 1850. Its membership was very largely Protestant Irish,³ and they were enthusiastic supporters of nativism, although not using their secret machinery for political work. The society was secret, with ritual and grand lodge organization. The New York grand lodge was organized in 1853 by the nine lodges then existing.⁶ In the fall of 1854, it claimed nineteen lodges with 2,800 members,⁷ and by 1855, there were about thirty lodges, mostly in New York city and Brooklyn. The names of "Washington," "Jefferson," "Bunker Hill" and "Valley Forge" are typical names borne by the lodges and are significant of their attitude toward American ideas. Like other societies, the Association lost heavily after

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<sup>1</sup> Baldwin Coll.
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Baldwin Coll.

² N. Y. Directory, 1854. ⁴ N. Y. Directory, 1853.

⁶ Herald, 1855, July 24, p. 1.

^{*} Times, 1853, May 31, p. 1.

¹ Courier- Enquirer, 1854, November 2, p. 2.

1856 by the collapse of the nativist party, but it kept an existence in New York city for over thirty years before the last of its lodges died out.

The Order of United Americans, derived from the American Brotherhood, was in no respect later in date than those here listed, but its story is taken up last because it was the most important of the nativist societies until it was overshadowed by the still greater importance of the Know-Nothing Order. In many respects it was a model on which the Know-Nothing society was built up and the source from which the Know-Nothing society drew its best recruits. Its history is very different, however, from that of the latter organization. United American society was not primarily political in charac-It aimed more at social prestige and its political work was a side-issue forced upon the Order by the conditions which The main features of the Order were not political. When the little society of the American Brotherhood first assumed its new name, on January 4, 1845, its members had an ambitious dream of a great secret federation. On January 27th they declared their little group to be Alpha Chapter No. I, and also declared themselves to be the Arch-Chancery or governing body of the Order. Their plan contemplated an evolution into a general system of organized groups. Each group was to be called a chapter and was to have its own constitution and self-chosen officers. The chapters in each state were to be federated under the supervision of a grand-body called Arch-Chancery, composed of delegates from the chapters. The several arch-chanceries were to be federated under one Grand-Arch-Chancery with a jurisdiction of national extent.2 This dream began at once to take shape in reality. The leaders of the new society were in part nativist political workers who knew how to build up organizations. A second chapter was formed on March 31st, under the auspices of Arch-Chancery, and others followed until, on September 8th,

¹ O. U. A., 1848, November 18.

there were five chapters, whose delegates met to organize Arch-Chancery in new form and do away with the temporary expedient of putting power in the hands of the members of the eldest chapter. As re-organized, Arch-Chancery consisted of three delegates, called chancellors, from each chapter. This body elected its own officers, of which the chief one was the grand-sachem. This was a distinct land-mark in the growth of the society.

The organization was usually known from its initials as "the O. U. A.," conveniently abbreviating its somewhat clumsy name. It was a social and beneficial society devoted to American traditions, but with no pledges or program of political conduct.² Its constitution was an open one, and there was no concealment of its aims or membership. Its secrecy covered only the signs and ceremonies connected with its work. It very closely resembled other secret societies of its day. The chapters worked under officers whose titles were borrowed from aboriginal Americans, the presiding officer of the chapter, for instance, being the sachem. There was a uniform ritual for all chapters, but there were no ritualistic degrees among the membership. The lighter side of chapter work was that of sociability. The business side of the work was the maintenance of a sick-benefit system, and the support of American ideas. On public occasions the chapters were accustomed to parade. The Order made its first public appearance in this way at the Washington-monument celebration in October, 1847, and its second one at the Adams funeral in March, 1848. These appearances were intended to advertise the Americanism of the society. Beginning on July 4, 1848, the O. U. A. also annually celebrated the recurring holidays of July 4th and February 22d. This was a custom formerly kept up by the nativist political clubs of the American Republican movement, but when that movement died out the O. U. A. constituted



¹ Baldwin Coll.

² Gazette-Times, 1846, December 1. ⁸ Republic, 1852, August.

itself heir to its commemorative duties. The O. U. A. endeavored in every way to stamp itself with the mark of American ideas.

Expansion was steady. In June, 1846, a chapter was formed in Boston, making the first step toward realizing the dream of nationality in extent. By the close of 1846, the Order had 2000 members, and through 1847 and 1848 its growth went on. In New York city it grew rapidly, but the rural counties were slower to embrace it. It was a novelty in its way of uniting secrecy and patriotism. Finally, in 1848 a chapter was organized at Haverstraw, and then the conservative interior towns gradually took it up. The strength of the Order in New York state was never very great in the country districts, however. In the way of national expansion the Order found its way into New Jersey and Pennsylvania in 1848, giving it four states to its credit.

The changes of expansion brought a new constitution to the Order which was approved by the grand body of the state on November 13, 1848.3 Under this instrument the age of admission to the Order was fixed at eighteen years. The grand body of the state was given the new name of Chancery and was to hold quarterly meetings. Its machinery was also elaborated by the recognition of an executive committee of which much will be said later. The title of Arch-Chancery was appropriated to the national governing body of the Order which was to be for a time identical in personnel with the Chancery of New York state. This new constitution was promptly put into effect. Chancery organized and assumed a seal with the suggestive emblem of a hand throttling a writhing serpent. Portions of its regular sessions were conducted under the forms of Arch-Chancery work.4 The grand execu-

⁸ O. U. A., 1848, November 18. Full text in Republic, 1852, August.

⁴ O. U. A., 1848, December 9.

tive committee also organized under the new constitution, and this body deserves careful notice. It consisted of nine members of Chancery and was to care for such matters as demanded prompt action or special secrecy. It was guardian of the executive fund, toward which each chapter paid quarterly dues for each member in good standing. In important matters the grand executive committee was empowered to call general or district conventions composed of the executive committees of chapters. This system of executive committees and conventions was only an expedient at its first inception, but it was destined to take upon itself new significance when politics began to be discussed by the Order and to play a considerable part in the work of political nativism.

Step by step the evolution of political work in the O. U. A. can be followed by reference to the proceedings of the grand executive committee.¹ It began its official record late in 1849 with the coming of a new Chancery. This was the period when the O. U. A. was hardly out of the experimental stage. Though successful thus far in its growth the Order was yet feeling its way into public favor with hesitation. The work of the executive committee did not at first touch upon politics in any way. Its members met occasionally and usually discussed plans for extending the Order into other states and for supporting an organ of the Order. During 1850, however, the committee twice took action which trenched upon politics in a tentative way. When the year opened the congressional struggle over the slavery issue had begun. On February 2d, Henry Clay wrote to his Whig friends in New York a suggestion for a "Union" mass-meeting,2 and the idea was at once taken up by them. On February 14th the grand committee voted to lend its aid to the plan and its members accordingly helped personally to bring about the Castle Garden

¹ All references to official action of the grand executive committee or the Grand Executive Convention are taken from their minutes.

² Times, 1855, November 28, p. 2.

meeting of February 23d. This incident was much magnified by nativist politicians a few years later in order to gain credit for the O. U. A. The second quasi-political move of the grand committee was in May, 1850. A referendum had been ordered on the repeal of the school law and an unofficial convention for debate was to be held at Syracuse in July. The grand committee was inclined to oppose the repeal, but decided to consult the chapters. For this purpose the first of a long series of grand executive conventions met on May 17th, and in the course of several sessions voted to uphold the old law and to send two delegates to the Syracuse convention. In an entirely harmless and innocent way, therefore, the grand committee in 1850 began the making of precedents for secret political action. These precedents were soon followed by a remarkable evolution of executive organization. In February, 1851, the Grand Executive Convention adopted rules of procedure and a password. Practically it erected itself by this act into a new and uncontemplated governing body standing over the whole Order side by side with Chancery itself. The O. U. A. executive work now began to differentiate from the social work carried on under the direction of Chancery and to touch hands with political nativism.

Putting aside for the moment the evolution of the O. U. A. executive system, due notice may be given to the steady growth of the Order, which though it drew its beginning from the political nativism of 1843-47 relied for its support upon its ability to preach patriotism in an effective and enticing manner to the community at large. The Order was not affected by the collapse of the political party in 1847. It went on to form chapter after chapter and to show each year an increasing roll of membership. Its internal history during the period from 1848 to 1852 is mainly a record of expansion. In 1852 its political work began to be recognized by the public and the Order attracted to itself more attention than ever before by the rumors

1 E. g., Whitney, p. 276.

to which its actions gave rise. In other states the Order was not as successful as in New York, but it found a foothold in one commonwealth after another. On January 16, 1854, a national Arch-Chancery was organized by delegates from several states and the New York Chancery ceased to be the head of the Order.¹ In 1854 the Know-Nothing society in New York state took a remarkable bound toward ubiquity and the parent society of the O. U. A. was perforce put somewhat into the background. It did not suffer by the fact, however, for the rise of political nativism was a piece of good fortune to be appreciated. The roll of membership kept on growing as the nativist political movement took further and further advances. By the end of 1855 the O. U. A. was at the height of its good The ambitious dream of its founders was at last Its national Arch-Chancery exercised jurisdiction in sixteen states. In the state of New York a roll of ninety subordinate chapters with thousands of members attested the popularity of the Order.

With the year 1856 the decadence of the Order began as political nativism halted in its steady progress toward power. The steady loss of prestige and strength by the Know-Nothing movement brought a corresponding change in the conditions of the O. U. A. The membership fell off, slowly at first, but rapidly as the reaction of public opinion against nativism grew more apparent. The O. U. A. has left but slight record of this decay. In September, 1857, it was noted that not half the chapters of the Order had sent delegates to Chancery.1 Year by year its membership melted away. The nativist political movement was drawing to its end, and so thoroughly had the executive system of the O. U. A. become interlinked with it, that the brotherhood was being dragged down with the dying nativist party. A mere shadow of its former strength, the Order lived to see political nativism end. In October, 1861, the grand sachem of the day advised a reorganization with the

¹ Gildersleeve Coll.

admission of loyal Protestant foreigners to membership,' but men's thoughts were fixed upon the great problems of wartime, and there was no chance for recuperation. By the month of January, 1863, the whole active membership in New York city was so small, that it could have met in one room.¹ Chapter after chapter went to pieces. Chancery maintained itself in life, but more and more feebly, until, early in 1866, its formal meetings closed.¹ The chapters also passed out of existence, but in 1877 some veteran members reorganized in a social club with the old name of Washington Chapter, O. U. A.

The enumeration of the various secret societies of New York which were agents in building up nativism, and the story of their rise and fall, is a prelude to the narrative of secret political nativism itself. Without due reserence to the existence, constitution and growth of these organizations, petty as most of them were, it is impossible to understand the strength which nativism had in New York city during the period in which the Know-Nothing Order rose to importance. Every lodge or chapter of these societies was a center and source of agitation against the foreign element and the ideas peculiar to it. More than that, the agitation was organized, systematic and incessant, a fact which means very much, indeed. Nativism existed, as has been shown, continuously in New York city from the beginning of the century as a popular sentiment, but it had no means of systematic expression, except when some political association would force it for the moment into sudden action, followed by eclipse as the association suc-

¹ Gildersleeve Coll.

² List of grand-sachems of New York state: John Harper, 1845; Simeon Baldwin, 1845; Thomas R. Whitney, 1846; Daniel Talmage, 1847, 1848; Jesse Reed, 1849; John L. Vandewater, 1850; William W. Osborne, 1851; Edward B. Brush, 1852; Thomas R. Whitney, 1853; F. M. Butler, 1854; F. C. Wagner, 1855; Laban C. Stiles, 1856; William B. Lewis, 1857; Edwin R. Sproul, 1858; James A. Lucas, 1859; John R. Voorhis, 1860; William E. Blakeney, 1861; W. S. Skinner, 1862; Charles E. Gildersleeve, 1863, 1864, 1865,

cumbed to mightier rivals. The nativist secret societies acted as conservators of the sentiment, drawing it together, massing it and sending it forth again to find such expression as it could. They were not secure against revulsion of public feeling, as their history shows, but they were secure against the enmity of politicians. The political leaders had no weapons to use against social movements of the form in which nativism was embodied up to the time that it attempted to pose as a political party.

When the American Republican movement passed away, in 1847, there were still in the community the old feelings of racial antipathy whose strength and depth is not to be measured by the poll of any election. It was these feelings on which the new nativist societies relied for their earlier growth. In 1848 and the years suceeding the people of America were deeply interested in the European uprisings. thought interpreted the events of the day as efforts toward a broader civil and religious liberty, and American opinion watched the struggle between absolutism and revolution with the keenest interest and sympathy. In that struggle the personality of Pope Pius IX. stood forth prominently as that of an arbiter whose word might make or mar the plan for which the revolutionists seemed striving. When, therefore, it was definitely seen that the Pope had gone over to reactionary ideas, the comments were such that Bishop Hughes felt impelled to use his pen in defense of papal acts. Then arose the old nativist argument that Catholics could not at the same time approve papal absolutism in Europe, and be honestly faithful to republicanism in America. The coming of Kossuth in 1851 perpetuated the discussion, for the Catholic bishop caused more comment by refusing to join in the hero-worship of the hour. These events occurred in the years when the nativist societies were growing, and the public was not disposed to look unkindly upon the new exponents of American

¹ Kehoe, ii, p. 776.

ideas. Had the new societies made any pretence at open political expression, the popular feeling toward them might possibly have been different, but nothing of the sort was yet hinted. The O. U. A. was the typical society of the hour, and it did not talk politics.

The gradual evolution of the new political nativism had nevertheless begun. Even while Bishop Hughes was penning his defense of papal policy, the executive bodies of the O. U. A. were throwing their influence in support of the public school system, to which the bishop was opposed. It was in the fall of 1850 that O. U. A. men applied the principles of their Order to politics by voting against that repeal of the school law which Bishop Hughes desired. As yet they had no political machinery to direct their vote, but that, too, was being planned by busy brains, and within a very few months would take up its work. The year 1850 was the one in which the new grand executive committee began to feel its way toward political action, which would depend for its success upon the machinery of a secret society. The fundamental law of the O. U. A. had nothing in it that would condemn common action by the membership in political matters, nor that would prevent them from using the regular machinery of the Order for that purpose if desired. The preamble of the constitution of 1848 had a paragraph on the relation of the Order to politics, but it did not discourage political action. It was as follows: 2

We disclaim all association with party politics. We hold no connection with party men. But we avow distinctly our purpose of doing whatever may seem best to us for sustaining our national institutions, for upholding our national liberties, and for freeing them wholly from all foreign and deleterious influences whatever.

The meeting of the first Grand Executive Convention of the Order, on May 17, 1850, was the beginning of the work of organizing a new executive mechanism. At that session several of the chapters of the Order were not represented, and in consequence a committee was appointed to see that those chap-

¹ Whitney, p. 278.

³ O. U. A., 1849, April 21.

ters should appoint executive committees in order to be represented in Convention. By the end of the year, accordingly, every chapter of the organization had its delegates. Then began a rapid evolution. On February 17, 1851, the Convention adopted rules of procedure and a pass-word system, which gave it secrecy in its workings. Later in the year it took up a plan for organizing the voters of the Order, and eventually completed its work, on December 16, 1851, by the adoption of a code of fifteen rules which mapped out a new and secret system of political work. Henceforth the political activity of the O. U. A. was to be managed by a mechanism which seemed remarkably well adapted to the purposes for which it existed. The new machine was not completed in time to be used in the fall campaign of 1851. At the November election there was, nevertheless, an evidence of O. U. A. activity. It happened that Henry Storms, one of the nominees on the Democratic state ticket, was a member of the O. U. A. That fact becoming known to the foreign element, he was roundly denounced by them and threats made of his defeat. As a matter of mere comradeship, the United Americans rallied to his support and were able to balance the effect of foreign hostility. 1

Under the new executive system all political matters fell under the control of the Executive Convention, composed of delegates from the chapters and acting under pledge of strict secrecy. The Convention shared power with a cabinet, namely, the grand executive committee. This cabinet was made up of nine men, of whom three retired annually. The members owed their appointment to Chancery, which was outside of the political mechanism. The committee was dependent on the Convention for moral support in all important moves, but at the same time its position was such that it could usually wield some influence over the larger body. This power on its part was due to three facts: first, the committee



¹ Republic, 1852, July.

² This description is drawn from the executive records.

held sole control of the executive fund; second, its tenure was not controlled by the Convention; third, the members of the committee were also members of the Convention. The committee and Convention were checks upon each other. jurisdiction of the executive bodies extended over the whole Every chapter in the state was entitled to representation in Convention, although as a matter of fact, very few chapters outside of New York city really sent delegates. For matters that concerned only portions of the Order's membership, a system of subordinate conventions was created. each county the chapters in that county could have executive conventions. The same was true of legislative districts. Over them all stood the Grand Executive Convention as supreme control. The manner in which the Convention was constituted favored its grasp at power. Had its individual members been merely delegates chosen by their chapters for no other purpose than to meet in Convention, their decisions might or might not have been accepted when reported back to the chapters from which the delegates came, but the Convention members were more than mere delegates. vention was really a mass meeting of the executive committees of the several chapters. Each member of it was an officer in his own chapter clothed with executive power and discretion. A mandate of the Convention could be carried out by the members of it and did not need to be reported back to the chapters for debate or approval. In practice an effort was made to keep political matters outside the sphere of chapter action. The old rule that no member of the Order should be in any way pledged as to his political conduct remained unaltered. A member of the Order was entitled to full independence as to his own vote. Over him the executive committee of his chapter had no power beyond mere suggestion. The Executive Convention therefore had this drawback, that its members must depend largely on their own personal influence in carrying out a political plan where the votes of the Order were essential. The O. U. A. executive system is an interesting example of political organization. Unfortunately, it never had the opportunity for free and full development. It had hardly been put in working order when the rival society of the Know-Nothings, with its much simpler mechanism and more thorough-going policy, attracted political workers to its ranks.

The political action of the O. U. A. executive system was intended to be strictly on nativist lines. One of the provisions in the fifteen rules of December was to the effect that the chapter executives should not use their influence or their funds for party purposes, but only for the purpose of opposing foreign influence at the polls. Another rule ordered that executive work should be carried on with secrecy, and should not be in the name of the Order. The precise method of work was laid out in another rule as follows:

Rule Nine: Whenever it shall be deemed necessary for the Order to aid in the choice of men for public office through the suffrages of the people, it shall be the duty of each executive committee to call together the members of the Order in their district prior to the usual primary elections or nominations, and determine upon suitable candidates of each party or either, as they may determine. It will be the duty of the members to assemble at the times and places of holding the primary meetings of such party or parties, and there use their influence in obtaining the nomination of the candidates they have selected. If the nominations are secured and ratified our cause will triumph, whichever party may be successful. Should the members of the Order nominate or select candidates already in the field, nominated by one party only, it will be the duty of every brother to sustain that selection independent of any party consideration.

The formulation of Rule Nine by the Executive Convention was a most significant step. It is the first authentic landmark in the history of what came to be known a few years later as "dark-lantern politics." Popular thought has laid the responsibility for secret politics upon the Know-Nothing Order, but all evidence now extant seems to show that in December, 1851, when these rules were adopted by the O. U. A., the so-called Know-Nothing Order was a neglectable quantity. It may perhaps have had forty members, but it was utterly

powerless and petty. The responsibility of introducing secret methods into New York politics must rest upon the greater society of the United Americans, whose membership at this time was numbered by thousands.

The new executive system of the O. U. A. was ready in time for the campaign of 1852. It was presidential year, and the work of politics began with the primaries held to select delegates to the preliminary conventions. On May 8th, the Executive Convention took its first formal step in the actual use of its new system. Resolutions in regard to presidential aspirants were passed after much debate and opposition. The resolutions recommended the chapter executive committees to use their influence at the party primaries toward the nomination of Millard Fillmore by the Whigs and the nomination of General Cass by the Democrats. Unfortunately, neither of the O. U. A. favorites secured the prize, and the Executive Convention refused to endorse either one of the nominees actually chosen by the great parties. The Convention also refused to endorse the nomination of Daniel Webster by the Native American Convention held at Trenton, New Jersey, in July. The Convention seems not to have attempted to influence the selection of state tickets by the great parties.

In regard to local tickets in New York city, the O. U. A. was able to exercise more effective judgment. In relation to these, there was a loosely organized nativist movement which expressed itself partly through the secret system of the O. U. A. and partly through an open movement that based itself on the idea of city reform. The same men were behind both forms of effort. It is at this time that Thomas R. Whitney comes to the front as a nativist politician. He was one of those who brought to the work of the secret society experience gained in the old movement of the American Republicans. During the whole Know-Nothing period he was prominent, but was especially representative of the O. U. A. and might be called the leading man of that organization. Whitney was one of the group

of nativists who organized the City Reform League, in September, 1852, to take a part in the fall campaign. The League did not announce any nativist principles. On October 11th. the Executive Convention of the secret order met to pass upon the local tickets. It did not adopt nominees for all the offices. but picked out eleven names, mostly those of Whig candidates.* Then, a little later, the Reform League also went through the work of nomination and supplemented the convention ticket by naming candidates for four offices which the Convention had passed over.3 All this preparation for organizing the O. U. A. vote did not go on without some hint of it reaching the outer world. As early as July rumors were current of action by the Order, and later on some of the New York papers stigmatized the Reform League as an offspring of nativism.4 In general, however, the daily press acted as if ignorant of the whole matter, and when the votes were counted they were justified for their silence by the weakness of the effort which had been made. The political groups stood as follows:

Democratic Party						about 31,250 votes.
Whig Party						about 23,800 votes.
City-reform movement						about 1,480 votes.
Nativist movement						about 1,480 votes.
Temperance movement						about 1,260 votes.
Anti-slavery movement						about IAO votes.

The importance of this campaign for nativism was merely that it had made a beginning. It was yet a very long way

¹ Post, 1852, October 5, p. 2.

³ Judge Supreme Court, Charles P. Kirkland; Judge Superior Court, John L. Mason; Sheriff, John Orser; Clerk, George W. Riblet; Corp. Counsel, Ogden Hoffman; Almshouse Gov'r, Washington Smith; Street Comm'r, John J. Doane; Coroners: Robert Gamble, Joseph Hilton, Charles Missing, Bern L. Budd.

⁸ Mayor, Jacob A. Westervelt; Comptroller, Azariah C. Flagg; Inspector, John H. Griscom; Repairs Comm'r, William Adams; Almshouse Gov'r, Washington Smith.

⁴ Republic, 1852, December.

from holding a balance of power. The Executive Convention had not met a very enthusiastic response from the Order in its effort to organize a vote. Probably the vote cast for the Convention's ticket represented about one-fifth of the voting strength of the Order. The newly-discovered organization of Charles B. Allen and his friends fell into the hands of members of the O. U. A. during the year 1852 and was growing. Probably it threw what little strength it possessed to the aid of the nativist ticket in this election of 1852, but there is no record of it. Before another campaign came round, however, the little organization had grown into a force that distracted public attention entirely from the executive work of the United Americans.

CHAPTER IV

RISE OF THE KNOW-NOTHING ORDER, 1853-54

By the close of 1852 the nativist secret societies were represented in New York city and Brooklyn by some sixty different bodies. Under the circumstances a popular revival of nativism in some form was a logical sequence. It appeared first in the form of attacks upon the Catholic church early in the next year. The English press supplied the stimulus. story came across the sea of the Madiai family in Tuscany. said to have been cruelly imprisoned for reading the Protestant Bible, and the American public expressed its horror suitably in public meetings, not forgetting to say many interesting and bitter things about the Roman church at the same time. Editorials and open letters on the subject came into print in large numbers, and their general tenor was that the Catholic church, judged by its own acts, was a foe to religious liberty. Another matter came before the public at the same time. The news dispatches from various American cities told how the Catholic bishops, with a curious similarity of effort, were attacking the American non-sectarian school system. The conviction spread, and was often expressed, that there was some sort of concerted plan on foot for the modification of the public school system to suit the wishes of the Roman church. also disturbed a nervous public. While these things were being discussed there came to New York an Italian orator, Alessandro Gavazzi. He had been a priest and teacher in Italy, and had become revolutionary under the liberalism of Pius IX. When the revolution failed he fled to England and abjured Catholicism. His visit to America was for the pur-[282 84

pose of delivering addresses, and the time was opportune, both for him and for the nativist societies who gave him welcome. Gavazzi was viewed by the public in something the same light as the hero, Kossuth, only, of course, the Italian had played a more humble part in the drama of revolution. He was considered to be sincere at least, and his bitter denunciation of the Catholic church, continued week after week, made a deep impression upon the people. Nativism expanded visibly under the influence of his work. An evidence of its existence was the Ninth ward riot of July 4th, in which an Irish procession was broken up, and its members driven from the streets.

In midsummer nativism began to take political form in preparation for the fall campaign. The men who began the movement at this time seem to have acted wholly independently of nativist secret societies. Their plan was for an open organization opposed to foreign ideas, but tolerant of foreigners who embraced American views. The first meeting was held about the first of August.1 The new movement was launched under the name of the American Party, and with a platform which touched upon most of the issues of the day.1 Among other things the platform stood for a free nonsectarian school system, restricted naturalization, Bible-reading in public schools, and non-clerical control of all property held for church uses. These ideas were sufficient to stamp the new party as a nativist one. It began to organize in much the same way as the American Republicans had done in 1843, but its experience was different. For two or three weeks all went well. A provisional committee began the work of organizing the wards. On August 17 the Ninth ward, where the recent riot had occurred, was organized,3 and others also shortly after. Hardly had the movement gotten under way

¹ Herald, 1853, August 3, p. 4, August 18, p. 1.

² Herald, 1853, August 18, p. 1.

when an element of extremists came in, which would be satisfied with nothing less than general proscription of all the foreign-born. Their views clashed with those of the moderate men who had fathered the new party. A conflict of ideas resulted, and the expansion of the party ceased as disputes began. Early in October the movement broke down. Some of its leaders went into the city-reform movement of the year. Their party disappeared.

The time had now come for the advent of the secret Order of the Star-Spangled Banner in effective political work. society had grown steadily during 1852 and the early months of 1853, but without coming into the notice of the general public. Its membership had been recruited until it reached into the thousands. That portion of the O. U. A. which was interested in politics joined the ranks of the newer order, attracted by its more thorough-going methods, and they were ready to use its machinery for the campaign work of 1853. The methods which were followed in the political work of this year were the same which had been formulated for the executive work of the O. U. A., and which had been used in the preceding campaign. They included a systematic effort to control, first, the party caucuses, then the party conventions, then the election itself. There is no record of the secret work of the Order of the Star-Spangled Banner in this campaign. The executive records of the O. U. A. seem to indicate that the organization of the nativist vote was practically left to the younger order. The existence of some sort of nativist influence began to be known when the Whig primaries met early in October, for there were tickets of nativist make-up put forward in several of the ward caucuses.² Very little notice was taken of this, however, for ward politics often showed petty phenomena of one sort or another, and the break-up of the abortive American Party was now going on, indicating the fu-

¹ Times, 1853, August 31, p. 3.

² Tribune, 1853, October 12, p. 5.

tility of political nativism. Nativist influence attracted more attention when the Whig senatorial conventions met, for it put forward Thomas R. Whitney in one district, and forced him upon the convention despite a bitter opposition. more the nativist influence came into view at the City Reform mass-convention of October 31st, which had been called to ratify a Reform ticket. The presence of two Irish lawyers upon the proposed ticket made it objectionable to nativists. At the mass-convention, accordingly, the ticket was refused ratification, and had to be withdrawn. This action, which showed clearly that the nativists were well organized for concerted effort, was ascribed by the press to the O. U. A.1 Thus far the existence of the Know-Nothing society seems not to have been known to the public. These outcroppings of nativist influence which the daily press noted were really mere hints of the systematic work which was being silently done by the secret orders. It was in the Whig Party that their influence was most apparent. All facts indicate that the most of the nativists at this time were Whigs. After the conventions of the older parties had been held the Order of the Star-Spangled Banner selected its own list of nominees from the tickets made by the conventions. It made for itself a state ticket, judiciary and city tickets,3 together with a few legislative nominations. The Executive Convention of the O. U. A. made selections on November 2d, but its action was far less sweeping. It disapproved one nominee on the Whig state ticket, and endorsed seven judicial and legislative candidates, but this was all. So far as the Convention went, it concurred with the secret ticket of its sister order. It is very probable that the harmonious action of the two secret societies in this and other campaigns of the time was due to the fact that the same men had control of both machines.

¹ Jour. Commerce, 1853, November 1, p. 2.

² Judge Supreme Court, Charles P. Kirkland; Justices Superior Court, John Duer, Murray Hoffman, Peter Y. Cutler; Judge Common Pleas, George P. Nelson; District Attorney, Chauncey Shaffer; Almshouse Gov'r, William S. Duke.

In the campaign of 1853 the work of the nativist politicians was in great measure unsuspected by the general public. Some hints of it must necessarily leak out, nevertheless, and those who were interested in politics became well aware that organized nativism was in the field. The work of the nativist element was most open in the contest for the place of district attorney. Blunt, the Whig incumbent of the office, was a candidate for re-election, but nativists disapproved of his lack of zeal in the cases arising out of the Ninth ward riot, and they supported against him a popular Democratic nominee. This hostility to Blunt attracted notice. Close upon election the information passed around that the new influence in local politics was a political secret society wholly distinct from the O. U. A. This was the first time that the existence of an unknown society had been recognized by the general public. to the name, numbers and nature of the mysterious society no one as yet had information, but almost at once a name was supplied for it. It began to be called the "Know-Nothing" Order in popular speech, because, as the daily press explained, the members professed to know nothing about it when questioned. Sometimes, later on, the authorship of the phrase was ascribed to E. Z. C. Judson, otherwise "Ned Buntline," who was a conspicuous exponent of radical nativism at this time. Whatever its origin, the name was used by the New York Tribune on November 10th, and this was perhaps its first appearance in print. It became common phrase as soon as the press adopted it.

The Know-Nothing state ticket of 1853 was of little significance in the final results of election, for the success of the Whig Party in the state campaign was a foregone conclusion on account of a split in the state Democracy. The ticket was only a record of nativist strength. The personnel of the first Know-Nothing state ticket included six Whigs and four Democrats selected from the state tickets of the older parties. It was as follows:

Sec'y of State George W. Clinton of Erie.
Comptroller James W. Cook of Saratoga.
Treasurer
Attorney-General Ogden Hoffman of New York.
Engineer John T. Clark of Oneida.
Canal Commis'r Cornelius Gardinier of Montgomery.
Prison Inspector Miles W. Bennett of Onondaga.
Judge, C't of Appeals Hiram Denio of Oneida.
Judge, C't of Appeals George Wood of Kings.
Clerk, C't of Appeals Benjamin F. Harwood of Livingston.

In support of this the secret orders cast a vote that represented very fairly the strength of their movement so far as it had developed. Their vote was as yet confined mostly to the counties of New York and Kings. Although it made a very noticeable difference in the poll of the ticket locally, it yet was lost in the greater aggregate of the state canvass complete. The Whigs carried the state by 60,000 plurality. The averages of parties for the state at large was as follows:

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Whig Party . . . . . . . . . . . about 161,700 votes.

Soft Shell Democrats . . . . . . . about 95,600 votes.

Hard-Shell Democrats . . . . . . about 94,800 votes.

Free Democrats . . . . . . about 14,600 votes.

Nativist movement 1 . . . . . . . about 2,000 votes.
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In the contest for city offices the nativist vote had much more importance. The break in the Democratic Party had made the Whig organization the strongest element in city politics, and even on the closely contested place of district attorney, the nativists were unable to overcome Whig strength, but they came fairly close to it. It was said that only the endorsement of Blunt at the last moment by one of the nativist societies saved him from defeat.* The poll of the local canvass gave the following averages: 3

¹ These figures underestimate the nativist vote in the state because the nativist split-ticket had too small a following in proportion to the total state vote to make it accurately distinctive in figuring averages.

² Herald, 1854, June 11, p. 4. ³ Comm. Advertiser, 1853, December 5.

Whig Party						about 16,400 votes.
Hard-Shell Democrats						about 13,110 votes.
Soft-Shell Democrats.						about 11,330 votes.
Nativist movement						about 4,220 votes.
Temperance movement						about 400 votes.

The election showed that the strength of political nativism had trebled during the twelve months since the campaign of 1852. This may be ascribed partly to the increase of nativist sentiment by the popular discussion of the year, partly also to the preaching of the secret societies, and partly to the confusion of the local politics of New York city consequent on the split in the Democracy. The nature of the new nativist phenomena was so little understood that it received very little attention from the local press. Some of the papers referred briefly to the existence of a secret mixed ticket. The Tribune. always unfriendly to nativism, described the secret nominations more fully. "This ticket," it said, "is the work of the managers of a secret organization growing out of the O. U. A., but ostensibly disconnected therewith. It is in fact a modified or rather a disguised form of Native Americanism aiming to control the elections of our city for the benefit of its leaders." A few days after this the Tribune again touched upon the new movement. "In the present instance it is perfectly well understood that the Know-Nothing organization is but a new dodge of protean nativism. It is essentially antiforeign, especially anti-Irish and anti-Catholic." 2 Before the close of November, as the result of its share in the campaign, the aims and existence of the secret order were well known, although its plan of organization was yet a mystery to all outside its ranks.

The secret society existed during 1853 in dual form. One branch was organized under a supervisory body called the State Wigwam and the other under a like body called the



¹ Tribune, 1853, November 10, p. 4.

² Tribune, 1853, November 16, p. 4.

Grand Council.¹ In each case these supervisory bodies were probably identical with the oldest wigwam or council of the respective branches.² The O. U. A. began its expansion under an arrangement of this kind. The date of December 7, 1853, given for the organization of the Grand Council by one authority,3 possibly indicates the transition to a representative body like that which occurred in the O. U. A. in 1845. The Know-Nothing society was thus a divided body whose two branches were engaged in earnest rivalry, though not necessarily a hostile rivalry. In this dual form the society began very early to find establishment in neighboring states where nativist feeling existed. There was apparently no systematic attempt to extend the society outside of New York, for its aims were primarily local, but in one way or another there had been visitors from other states admitted into the Order and they had duplicated in their own cities the methods whose operations they had seen in New York.4 In New Jersey, Maryland, Connecticut, Massachusetts and Ohio, there were more or less flourishing offshoots of the society in existence by the fall of 1853.5 This expansion is said to have brought about an agreement between the two separated branches in regard to the growth of the society outside of New York. Under the compact the wigwam organization was to have the sole right of issuing new charters in the region north and east of New York city, while the council organization was to have the same right over the region to the south and west.⁶ This arrangement, if it were really made, foreshadowed a national organization for the society, but as yet, and for some months to come, there was probably no real bond between the branches in the different states. There was no federal body to wield power. Whatever coherence there was must have rested solely on voluntary pledges between the scattered groups.

⁸ Whitney, p. 284. Carroll, p. 269.

⁸ Whitney, p. 284; Carroll, p. 270.
⁶ Carroll, p. 269.

Scarcely had the elections of 1853 passed by when events brought the new secret organization to the front in the engaging role of champion of free speech. Its opportunity for this came with the breaking out of trouble over the anti-Catholic street preachers. Gavazzi's harangues against the church had inspired less talented imitators in some of those cities which were storm-centers of nativism. In Baltimore and Louisville. notably, the nativist feeling had been stirred by the incendiary harangues of street preachers during the summer of 1853. New York city the custom of street preaching was an old one, but hitherto harmless. Now the tendency to attack the Roman church excited the notice of the foreign element, and the street sermons gave rise to small conflicts between the rougher representatives of the opposing faiths. called the attention of the police to the street preachers and plans were laid to maintain order. On Sunday, December 11th, the police accordingly interfered and arrested a preacher named Daniel Parsons who had been talking on successive Sundays at the shipyards and wharves of the east side. This act aroused a storm. The word passed around that Parsons' arrest had been made to placate the Catholics. Very soon an angry mob was surging round the mayor's house, demanding the man's release. One of the city judges averted danger by freeing the prisoner and then the mob dispersed.

On Wednesday following the arrest hand-bills scattered through the city called the people to a mass-meeting for upholding free speech. The call was unsigned, but it was plainly a nativist move. When evening came there were thousands of people massed in the moonlight at City Hall Park to answer the call. The meeting itself was carried through smoothly by those in charge. The presiding officer was a city merchant, James W. Barker, who had joined the Know-Nothings only a few months before, but who was already

1 Tribune, 1855, June 4, p. 5.



prominent in the secret organization. This was his first public appearance as a nativist leader. The speeches and resolutions of the meeting took as their theme the American right of free speech, and charged the city authorities with violating that right to please the Roman church. The effect of the meeting was to excite both the native and the foreign element, and for a few days there was a stirring that looked toward strife. Again, as in 1844, the mayor of the city and the Catholic bishop issued their respective proclamations to avert the danger of racial conflict. When Sunday came round again, the whole city nervously awaited results, fearing riot. Parsons preached that day to an audience of 10,000 persons. was somewhat more mild in speech, and no champion of Catholicism appeared to interrupt, so the throng melted away peacefully when the talk was done. The right of free speech was vindicated and the crisis was past.

This series of incidents made a dramatic episode in the local history of nativism. In after years there lived a tradition that the Know-Nothing Order had its origin amid these events. At the time of its happening it forced upon the community a sudden realization that the mysterious Know-Nothing Order was a strong, energetic and watchful force. The growth of the nativist societies received a new impulse. nativist journals announced themselves to the public eye. New speakers sprang out of obscurity to attack the Catholic church. On every hand there were patent signs of popular sympathy. The O. U. A. was the greatest of the nativist societies, and the visible symbol of nativism. On February 22, 1854, it made a formal display of its strength. An immense procession of its chapters, interspersed with nativist military companies, wound through the city streets with waving banners and patriotic devices. The procession was designedly an exhibit of organized nativism for the benefit of the foreign element, and it won prestige for the movement in the eyes of native and foreign-born alike. All through the earlier months

of 1854, and up to the opening of the fall campaign, the ideas of nativism persistently forced themselves to the front in the life of the city. The unpopularity of the Irish people grew more intense under the stimulus of the warfare which was being made upon them. The leaders of nativism did not countenance anything that leaned toward violence, but the younger and the rougher elements of the community rather welcomed a pretext for disturbance and conflict. Frequent petty collisions were reported by the daily press during the winter and spring months, and these grew in violence until, by June, they were seriously called riots. The street preachers were in part responsible for the disturbances.

Amid these scenes a new nativist secret society came to light, which was in time to become a factor in the political nativism of the city. At its inception, however, it was rather social than political. Some time during the spring of 1854 a young man named William W. Patten conceived the idea of founding a nativist secret society for the vounger men who were ineligible to the Know-Nothing organization. He drew up a ritual with the aid of an anti-masonic book, and called his new society the Order of Free and Accepted Americans.1 Around Patten there was quickly gathered a large company of the younger men. They did not use the real name of their order, but usually called it the Order of the American Star, from its emblem, a fivepointed star bearing in its center the figure 67. knew that this number referred to the age of Washington at his death. Sometimes the members were called the "United Brethren," but more often they were known as the "Wide-Awakes," from their rallying-cry. It was this society whose members were at the front in the street disturbances and



¹ The beginnings of this society were described in a pamphlet of 1855, and the ritual was given in full. Original copy in Gildersleeve Coll. Reprint in *Tribune*, 1855, September 5, p. 7. See also a distorted reference in *Tribune*, 1855, May 29, p. 5.

which gave to a certain style of hat the name of the "wide-awake," because favored by the members. By the middle of June the white felt "wide-awake" hats were everywhere deemed the insignia of nativism, and exposed the wearers to attack from Irishmen at very short notice.

The Irish-Catholic population thoroughly realized by this time the extent of the antipathy which was directed against them. With the masses it aroused only a blind anger, but some of the better-educated leaders of the group acknowledged that the nativist feeling was not without basis, and counseled their fellow-countrymen to change their habits. An open letter from Editor Lynch of the *Irish-American* is an example of these utterances, and it gives also the following interesting summary of the complaints against the Irish-Catholic element:

"Fellow countrymen and friends: I desire to point your special and emphatic attention to the approaching elections. You have at present opposed to you a bitter, inimical and powerful secret society called the Know-Nothings: opposed to you, to us Irishmen particularly, on the grounds that we are impudent and voracious cormorants of petty places under government; that we are ignorant, turbulent and brutal; that we are led by the nose and entirely controlled by our clergy; that we are willing subjects of a foreign prince, the Pope; that we are only liprepublicans; that we are not worthy of the franchise; that by the largeness of our vote and the clannishness of our habits and dispositions we rule or aspire to rule in America; that we are drunkards and criminals; that we fill the workhouses and prisons; that we heap up taxes on industrious and sober and thrifty citizens; and that for these and other reasons we should be deposed from our citizenship, and in fact rooted out of this American nation as a body by every fair and foul means: And I can tell you that outside the secret organization of the Know-Nothings, outside and beyond its influence and power, an anti-Irish and anti-Catholic sentiment prevails," etc., etc.

There was, in fact, a general assault all along the line upon the objectionable people during 1854. Not only were the secret societies, the Protestant clergy and the preachers of the streets attacking the foreign presence, but the attacks were

¹ Times, 1854, June 12, p. 4.

² Times, 1854, August 30, p. 2.

finding their way into print in all forms. There were a half-dozen periodicals devoted specially to nativism, and these were reinforced by printed pamphlets and nativist books. Popular fiction grew up to meet the new demand, and cheap novel-writers found new materials in the woes of captive nuns and the wiles of Jesuit brothers. The nativist sentiment entered into the homes and daily thoughts of the people as never before. The title of Know-Nothing took on a broad meaning under these conditions that made it practically synonymous with nativist without reference to membership in the mysterious society from whence the name came.

Public curiosity was all agog over the unknown organization of the Know-Nothings. Wild stories flew about, telling of thousands of armed men secretly banded for unknown purposes.¹ Neither the Irish leaders nor the local politicians liked the new movement, for both were apprehensive of its effects upon their plans. These two classes earnestly watched for real knowledge of the secret society. In January of 1854 a Catholic paper succeeded in getting and printing the constitution of the Guard of Liberty, an organization which was supposed for a time to be the unknown Know-Nothing Order.² Soon, however, it was learned that the Guard was only a nativist military society of some 300 members, which had a secret ritual.3 It was not the much-sought order after all. The first real inklings of the nature of the Know-Nothing secret system came to the New York newspapers from New Orleans and Philadelphia papers, in which cities the secret order was also an object of curiosity. Certain papers in those cities learned the requirements for admission to the society, the number of its degrees and certain of its secret signs and words. These revelations were copied in March, 1854, by the New York Tribune, whose editor was always ready to attack nativism.4 These uncorroborated accounts were not

¹ Times, 1853. December 23, p. 8.

² Herald, 1854, January 30, p. 2.

⁸ Herald, 1854, February 23, p. 1.

⁴ Tribune, 1854, March 25, p. 6.

enough, however, and the public was still waiting when a curious case in the local courts promised light upon the inmost secrets of the unknown company. One John E. Elliott swore out a warrant against three respectable citizens charging them with burglary. The actual facts were that Elliott was grandsecretary of that branch of the Know-Nothings which adhered to the founder, Charles B. Allen, and as such he had custody of the secret ritual. Suspecting him of an attempt to sell the ritual a committee of three, one of whom was Allen. broke into his office and carried away the trunk containing the official papers.1 These three were the men whom Elliott accused of burglary. Of all this the public knew nothing except that Elliott was an officer of the unknown order and might make interesting revelations. The interest in the burglary case was intense, but the case balked curiosity completely. At the second session Elliott failed to appear, and the charges were quietly dismissed.

Hidden behind its silence through all these months of questioning the Know-Nothing Order was ever growing. By May 1, 1854, there existed in New York state fifty-four scattered bodies,² most of which were located in New York city or in the counties lying adjacent, where nativist sentiment had been fostered by the O. U. A. and other nativist societies. The spring elections of 1854 gave opportunity for the rural bodies to use their power, but nowhere does their presence seem to have attracted notice except in New York and Westchester counties. It was at this time that the leaders of the secret order in New York united on a plan to weld together its scattered forces into a national secret political federation. Outside of New York state there were branches of the society located in twelve different commonwealths. Calls were issued for a convention of New York bodies to meet in May, and for a general convention to

¹ Times, 1854, May 18, p. 8; May 19, p. 5; May 20, pp. 5, 8; Tribune, 1855, May 20, p. 5.

² Times, 1855, March 8, p. 8, March 16, p. 3; May 22, p. 2.

meet at the same time. The plan to put aside old differences was successful. On May 11th the delegates of the state completed the work for which they had been called. By their action the wigwam branch and the council branch were united under a single state body called the Grand Council of the State of New York. Only one body, the Seventeenth ward council, with 300 members, refused to acquiesce.2 The officers of the new Grand Council were all residents of New York city: James W. Barker, president; Joseph E. Ebling, vice-president; Joseph S. Taylor, treasurer, and Henry Farrington, secretary.3 The jurisdiction of the body covered the state. On May 14th the general convention met, with delegates present from New York, New Jersey, Pennsylvania, Massachusetts, Maryland, Virginia, District of Columbia and Ohio.4 It adjourned after making arrangements for a fuller gathering later. On June 14th another general convention was held by delegates from thirteen states, who gathered at New York city and organized themselves as a Grand Council of the United States. Of this body, too, James W. Barker was chosen president.5 On June 17th the delegates completed the organization of the Order by adopting a constitution and a new ritual.6 Under their hands the national Grand Council became a permanent body, holding jurisdiction wherever the Order spread and making unified action by the whole Order a possibility.

In New York state the re-organization was not intended to bring with it any alteration in the methods of the past. All the ultra-secret characteristics of the society were retained and the old idea of limited political action was kept. The following resolutions were passed by the Grand Council of New York on June 8th in regular session:

¹ Times, 1855, March 8, p. 8. Also inaccurate account in *Herald*, 1856, June 3, p. 10.

² Herald, 1854, December 20, p. 1. ³ Times, 1854, October 26, p. 5.

Carroll, p. 270. 6 Ibid. 6 Herald, 1854, September 25, p. 2.

⁷ Times, 1854, October 23, p. 1; Herald, 1854, November 4, p. 1.

Resolved, That the principles of our Order, as laid down in our obligations and private work, forbid that we should appear before the public in any respect as a distinct body or known organization, and that, therefore, it is the duty of each member of the Order to set his face against and to strongly oppose all and every effort to bring the members of this Order before the public as a distinct political body.

Resolved, That the proper constitutional and political theater of action of this Order as a body is only inside of our respective council rooms, and while our constitution and private work remain as they now are, it is the duty of this Council and each subordinate council to oppose all efforts to draw us as a body from our proper sphere, and thus to tempt us to commit a radical and vital wrong to the grand principles of secrecy upon which the whole superstructure of this organization is based.

The essential change which the Order underwent at this time was in the form of executive management. A number of executive powers were vested in the presidents of councils and in the president of the Grand Council. Under one of these powers Grand President Barker at once appointed deputies for counties and began to build up a systematic expansion of the society.* In New York city there was also organized a general executive committee with oversight over the affairs of the Order in the city.* Under this system the grand president of the Order was a strong executive, and Barker became the soul of the nativist movement. Under the stimulus of his executive genius the Order rapidly spread over the state. Between the dates of May 1st and June 1st, according to one authority, the number of councils increased from 54 to 91, and this increase, due largely to political causes, went on by leaps and bounds in the weeks following.3 The Know-Nothing Order now became a body whose influence extended all through the state, and its leaders began to plan for higher flights of power than nativism had ever before been able to essay. At the same time the city of New York remained for a time the center and citadel of the secret order, where its in-

¹ Times, 1855, March 8, p. 8.

¹ Herald, 1854, October 30, p. 1.

^{*} Times, 1855, May 22, p. 2.

terests mainly lay. The maintenance of nativist sentiment there was a vital necessity to the cause of organized nativism.

Leaving the thread of narrative for a time, it is well to see what manner of society this was which sprang so suddenly out of vacancy and stirred so deeply the popular thought. The organization which was created by the Know-Nothing constitution of 1854 was a political machine which borrowed some features from the O. U. A., but which was far more centralized than the latter. The proper name of the society was that of The Supreme Order of the Star-Spangled Banner. was a secret, oath-bound brotherhood, whose aims were wholly political. It had no benefit system or social side in its scheme of effort. Only those could join who were Americans born, and who were unconnected, either personally or by family ties, with the Catholic system.2 Its membership was a graded one of three ranks. The lowest rank included all members of the Order.3 Admission thereto was gained by taking the obligation of the first degree. Next above in rank were those members who were deemed competent to hold office in the Order.3 Admission was gained by taking the No one could hold obligation of the second degree. office in the Order until admitted to this degree. Still higher in rank stood those members of the Order who were deemed competent to hold public office in the community.3 Admission to this class was won by taking the obligation of the third degree. Apparently, no member of the Order could be endorsed for public office unless he had been admitted to the third degree. The obligation in any one of these three ranks was conferred upon such persons as might be proposed by a brother of that degree and found acceptable by a ballot of the members who already held the degree.4

¹ Herald, 1854, September 25, p. 2. ² Tribune, 1854, March 25, p. 6.

^{*} Times, 1855, May 29, p. 4.

⁴ Times. 1855, May 22, p. 2; 1856, March 3, p. 3.

The general membership of the Order was organized on the lodge system. Each separate group was called a council, and the councils in each state were federated under a supervisory body called a grand council. Over and above the grand councils stood the Grand Council of the United States, usually called the National Council. Each subordinate council included such members of the Order as resided in some specific political area. Each council was designated by a number, and existed by virtue of a charter granted under the authority of the Grand Council. It elected its own officers and enacted its own by-laws, subject always to the written constitutions of the Grand Council and the National Council. At ordinary sessions all members of the council sat together as a firstdegree council. Such members as held the second degree might hold separate session for special business as a seconddegree council.^z Such sessions, in practice, were usually held after the adjournment of the first-degree body.* there was also a third-degree council session.3 The officers of a council bore the ordinary titles of president, vice-president, and so on. The president was the executive head of the body, and not merely a presiding officer. He had the custody of the charter,4 and of the written ritual, and also had general oversight of political work in the district over which the council held authority.

The Grand Council was a representative body composed of three delegates from each council in the state. The term of office of each delegate was three years, and one new one was elected annually in each council.⁵ In this respect the Grand Council was copied after the Chancery of the O. U. A. The Grand Council existed by virtue of a constitution which had been approved by vote in the subordinate councils, and which could be altered only after a referendum to the councils. Its

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<sup>1</sup> Times, 1855, May 22, p. 2. <sup>2</sup> Times, 1855, July 11, p. 3.
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⁶ Times, 1854, October 23, p. 1; 1855, May 22, p. 2.

meetings were quarterly, with special sessions when required. In New York state the annual session, at which officers were elected, took place in February. The Grand Council elected its own officers and enacted legislation, subject always to its own constitution and that of the National Council. It enforced discipline, interpreted the laws, decided disputes. general it directed and co-ordinated the work of the Order within the state. Its officers bore the same titles as those of subordinate councils. The president, who was properly styled grand-president, was presiding officer of the Grand Council and executive head of the Order. It was his duty to carry out the orders of the Grand Council, and to exercise general oversight over the state. The work of expansion came under his eye. In his hands lay the selection of district deputies, of whom one was appointed in each county.^z The president also assumed to appoint traveling deputies. These deputies were, as their name implies, holders of power vested in the president, and delegated to them by him. Their special duty, in practice, was to recruit the Order by calling new councils into existence, and to maintain enthusiasm in those They were personal representatives of already established. the president, and through them the latter kept in touch with the remote sections.

The Grand Council of the United States, or National Council, existed by virtue of a written constitution adopted by general convention, and was the highest body in the Know-Nothing system. It was a representative body composed of delegates from each state where the Order was existent. It legislated on matters connected with the secret ritual and also discussed matters in which the interest of the Order touched national politics. It could propose amendments to its own constitution, but they must be ratified by the various grand councils before they could become effective.

In its methods of council procedure the Know-Nothing

1 Times, 1855, May 22, p. 2.



society followed the usual ways of secret societies. The experience of those societies had evolved certain features as necessary to preserve secrecy in work. These features included the use of grips, pass-words, signs, phrases of recognition, signals of distress, test formulæ and rallying cries. All these naturally found a place in the Know-Nothing system. The experience of other societies had also evolved certain ceremonial forms. There were special formalities for opening and closing the session of a secret body, for entering or retiring from the meeting, for initiating new members and for installing officers. These, too, found a place in the system of the Know-Nothings. Besides these features there were some practices which were peculiar to the Know-Nothing society alone, as a result of its ultra-secret character. In other secret organizations the members were not supposed to conceal their connection, but the Know-Nothing system endeavored to aid its members in doing so. To this end the time and place of council sessions were not divulged, nor were public notices issued calling the members together. The custom was to scatter about small pieces of blank paper cut in shapes previously agreed upon, as a signal that a meeting was at hand." To the same end the name of the secret order was not divulged to the initiate of the first degree. Even though public rumor did pass around the real name of the society, the first-degree member could truthfully claim to "know nothing" of any order of that name.

In its political work the Know-Nothing system was based on the idea that political policy should be decided in an orderly way by the general voice, but enforced by the unhampered act of single executives. This idea, as applied to local politics, was well carried out. The Know-Nothing council in its best days was, in point of fairness and decency, a vast improvement over the average party caucus of the time. Every voter in the council had free expression, and the ulti-

¹ Times, 1855, March 17, p. 4; Tribune, 1854, March 25, p. 6.

mate decision was executed by proper officers with energy and system. The idea was not so well wrought out, however, in the hastily evolved machinery of the state campaign of 1854. The Know-Nothing system on this side was weaker than that used by the regular parties of the day. At the basis of the political system of the Order was the council, which was intended to control some small political area. In New York city there was one council for each ward. In smaller cities a single council might cover several wards. In rural towns a council might cover as many election districts as expediency suggested. Such matters as concerned only the voters in the small area thus covered would be brought up in first-degree council, debated and decided by vote of those present. Where there were several councils in one city, there was usually a general executive committee, chosen annually and composed of delegates from each council. Local matters pertaining to the whole city would be in this case debated and decided provisionally in general committee and then referred back to the various councils for approval or disapproval. In New York city the general committee was composed of sixty-six members, being three from each ward council. For counties and legislative districts a convention system was devised. For the handling of political matters for the state at large the Order had no adequate system. The Grand Council took upon itself the function of a convention, but the three-year tenure of its members and the lack of any complete or proportionate representation made its acts, very properly, open to bitter criticism.

The execution of such decisions as were formulated by the councils or the representative bodies of the Order was entrusted to specially chosen officials. In New York city these officials formed an executive hierarchy acting under an order issued by the general executive committee on July 17, 1854. Under this order the Know-Nothing voters in each ward were subdivided

¹ Herald, 1854, October 30, p. 1; Times, 1855, July 19, p. 3.

² Herald, 1854, October 30, p. 1.

by election districts, and these groups again subdivided into groups of ten. Over the whole ward stood the president of the ward council as executive officer, with the corresponding secretary of the council as his executive assistant. Over each election district was a "superintendent," appointed by and responsible to the president, who could remove him at will. Over each group of ten voters was an "assistant," appointed by and responsible to the "superintendent" of the district. Through these officers a registry of voters was formed and kept by the corresponding secretary, and by them the Know-Nothing voters were marshaled to caucus or election. In the rural districts the supervision of voters was probably less complete, but data are lacking.

In the management of the voters the officials of the Order seem to have depended chiefly on the influence of the pledge which members of the Order had taken. Great care was taken, also, to keep before the members, by means of literature and nativist speeches, the ideas for which the Order was supposed to stand and for whose success the members' votes were demanded. No formal platform was put forth, but a formal address was issued having something of the same character. The pledge taken by the members of the first degree was probably somewhat indefinite as to the use of the franchise. pledge of the second degree contained an assent to the promise "that you will vote in all political matters and for all political offices for second-degree members of the Order, providing it shall be necessary for the American interest." This left to the taker a certain latitude of judgment, which the Grand Council of October, 1854, tried to narrow by a declaration that the pledge meant to require the support of all Know-Nothing nominees.* This action by the Grand Council was the beginning of a system of party discipline. After this interpretation it was possible to expel any bolter from the Order on the ground that he had violated his obligation.

1 Times, 1854, October 23, p. 4.

2 Ibid.

vember, 1854, the Grand Council elaborated the discipline by creating "the test." This feature consisted in calling up any member of a council or of the Grand Council in a regular session and requiring of him a statement as to how he had cast his vote at some particular election. Expulsion might follow an admission of disloyalty to the regular ticket.

This description of the secret machinery of the Know-Nothings applies to the Order as it existed during the fall and winter of 1854, when it first began to pose as a political state organization. The same description will not fit the Order accurately at any other time of its career, for its machinery was continually in evolution. The exigencies of political struggle were continually bringing out points in the secret machinery where it was hampered in its political efforts. The tendency, therefore, was always in the direction of assimilating its structure to that of the regular political parties of the day. The secret system in its most typical form was that here given. As a machine it was far better adapted to local than to state political work. Its purpose was to secure unity and vigor in the control of votes, and under shrewd management it had tre mendous capabilities in this direction. It was weak, however, as a state society, because it had no equitable method of deciding matters of state politics. The Grand Council was not properly constituted for nominating tickets. Probably the greatest source of danger in the whole system was the power that fell to the grand-president. His appointment of district deputies enabled him during the period of expansion to manipulate the county delegations and exercise undue influence over the Grand Council. The degree system of the Order does not seem to have been a danger, although it would seem naturally to foster cliques. There certainly were cliques in the Order, but their existence seems to have depended on personal influence and never on the artificial distinction of a de-

¹ Times, 1854, December 4, p. 1; 1855, March 8, p. 8; Tribune, 1855, October 6, p. 5.

gree. In this machine, too, the rights of the individual were safeguarded, and this is strongly in its favor. The individual voter in the secret order had probably more real influence upon politics than the average individual in the parties outside the Order.

CHAPTER V

THE STATE CAMPAIGN OF 1854

THE entry of nativism into the field of state politics in New York was at a time when the old parties were disintegrating. Its phenomenal success in winning voters to its service was due to the weakness of those older party systems which nativism tried to displace. Its history as a factor in state affairs is for a time inextricably mingled with that of the factional divisions in the older parties. When the year 1854 opened, nativism had no place in state politics. The field was occupied almost exclusively by the two great national parties, already, however, weakened and divided by the rivalries among their leaders. For the time there were no great issues insistently pressing for notice and holding together the uncongenial elements in either party. The unity of party management was already broken when leaders in the same party stood at open enmity. The voting strength of each side, it was true, showed no great change as yet, but in the absence of any unifying principles the voters were attached to their respective parties only by the weak tie of fealty to names and traditions. On the Democratic side a faction fight had disrupted the party in 1853. Two separate divisions, called in popular phrase Hard-Shells and Soft-Shells, now duplicated the party organization and maintained their respective claims to the party name. This division represented nothing more than the opposition of certain leaders to each other. On the Whig side there was no open break in the unity of the organization, but there existed two bitterly antagonistic factions. One of these, headed by William H. Seward, bore in political 108 [306

slang the name of Woolly-Heads. The other, headed by Millard Fillmore, bore the nick-name of Silver-Grays. Here again there was no real principle at issue between the two. The division stood only for a rivalry of leaders. With the two old parties in this weakened and divided condition, it was to be expected that on the appearance of any new and living issue in politics it would be seized upon by one or another of the struggling elements as an aid to success over the opposition. The political history of New York during 1854 deals with the appearance of three living issues in state politics, and with their peculiar effects upon the old party organizations.

The temperance issue in state politics began to take definite form in 1853. For a number of years previous there had existed several voluntary societies, both secret and non-secret. extending over the whole state. Under their shelter there had grown up an agitation in favor of the restriction of liquorselling. At first this movement was non-political, but after a time it began in various localities to express itself at the elections of local and legislative tickets. Then a state organization was formed, which assumed to encourage political action of this sort. Thus a loosely organized political movement came into being. It did not seek to become a separate political party, but it drew to itself members of both parties without disturbing old affiliations. The legislature which met at the beginning of 1854 had several members who were under pledges to this movement as a result of its political efforts. Upon their initiative and with the approval of Senator Seward, the Whigs of the legislature joined in framing a prohibitory liquor law. The law itself was killed by the Democratic governor, but the Whig leaders had won the favor of the organized temperance vote by their action and had paved the way for the absorption of the temperance issue by the Whig organization should it be deemed desirable. Encouraged by their experience, the leaders of the temperance movement were preparing in the summer of 1854 to nominate a state ticket for the fall election. The issue of temperance, thus brought fairly into state politics by the Whigs, tended to cut across party lines. There were thousands of voters whose fealty to party names would be broken by their liking or dislike for a prohibitory law. This issue had therefore a tendency to break down old lines.

The anti-slavery issue had found expression in state politics long before 1854, but events had so relegated it to the background that it was, at the beginning of 1854, hardly to be regarded as a great issue. In its abolition phase it was the tenet of the little group which called itself the Liberty Party, and in its free-soil phase it was the chief theory of the larger group of the Free Democrats, but in its anti-expansion phase it had been out of politics since the compromise of 1850. Early in 1854 the congressional contest over the Nebraska Bill revived the issue of opposition to slavery expansion. various portions of New York state public meetings were held to arouse sentiment. Senator Seward was a vigorous opponent of the Nebraska Bill, and very early it was noticeable that his political friends in New York were aiding to make anti-slavery an issue in politics. By the summer of 1854 the anti-Nebraska general committee of New York city was engaged in organizing local committees in the interior counties. and the work was taking definite form as an organized political movement, drawing strength from both the older parties, but directed very largely by the Seward Whigs. This issue cut across old party lines far more strongly than the temperance issue was doing. Among politicians of the Whig Party the Seward men were anti-slavery, while the Silver-Grays tended toward views more friendly to the South. Among Democratic politicians the Soft-Shells, who held federal patronage, followed the lead of President Pierce in favoring the South, while the Hard-Shells stood uncertainly aloof in contrast. Among the voters the issue found supporters and opponents in every faction. The more earnest ones inclined to ally

1 Herald, 1854, April 13, p. 4.

² Post, 1854, June 26, p. 2.



themselves with the so-called anti-Nebraska movement, and under the influence of this issue party fealties gave way.

The cohesion of the old parties was already being undermined by the temperance and anti-slavery issues when nativism came into the field. The re-organization of the Know-Nothing society in May, 1854, and the accession of James W. Barker to power were the conditions that brought the nativist issue to the front. In the earlier months of 1854 there had been branches of the secret order established in some of the Hudson River towns, but their purpose seems to have been local effort only. After the accession of Barker he appointed his district deputies for each county and systematically organized the expansion of the society. Councils at once began to multiply with extraordinary rapidity. On June 1st there were 91 councils in the state. By July 12th there were 152. By August 1st there were 201.1 The secret of this success lay in the fact that the new movement received the hearty aid of the Silver-Gray politicians,* who saw in it a chance to fight Seward. Nativism looked with most unfriendly eye upon the great Whig leader. He was an open friend of the Irish element and of its ecclesiastical leaders. He had fought the nativist idea during the old American Republican movement of 1843-47, and had maintained consistently the same attitude toward it ever after. It was a certain fact that political nativism would be repudiated and crushed wherever the friends of Seward had the power. The factional opponents of Seward were right in their approval of the new movement as one likely to aid their ends. The Democratic Party in the interior counties was also affected by the secret movement, but far less than was the Whig Party. The Soft-Shell managers condemned nativism early in the summer,3 before the Order had fairly begun its marvellous expansion, but were less outspoken later. The Hard-Shell managers were guardedly friendly, hoping to

⁸ Post, 1854, May 12, p. 3, September 20, p. 2; Herald, 1854, July 4, p. 2.

profit by the new movement. Politicians on all sides thus regulated their attitude toward nativism according to the way in which it seemed likely to help or hinder their factional interests. Like temperance and anti-slavery, it was an issue which worked against the coherence of the old parties.

Among the masses of the voters other considerations helped the Know-Nothing expansion. Taking the interior counties as a whole there was no natural basis for a widespread nativist sentiment. Except in the towns along the line of the Erie canal, the foreign-born element was very small and not especially objectionable. In the canal towns the Irish element was more or less unpopular, and here there might be a genuine feeling of nativism, but in general the spread of the secret movement was not due to actual dislikes. It was the peculiar secret character of the Know-Nothing Order which proved a magnet to the country voters. The idea of secret politics was a novelty, and human nature was responsive to novelty. The mysterious manner of the Order's workings, the dramatic successes that it won, the patriotic professions that surrounded its efforts all combined to throw about the organization an irresistible attraction. The doctrine of nativism, too, was one about which there could be no great differences of opinion among native-born Protestants. There might be differences of opinion as to the expediency of forcing that doctrine to the front, but the abstract idea of protecting American institutions against "the insidious wiles of foreign influence" was beyond In this respect the nativist issue had an advantage criticism. over the issues of temperance and anti-slavery, both of which were open to opposing views as to their merits. There were also some less serious aspects of the nativist movement which appealed to voters. The American idea of humor was pleased by the chagrin which the secret order brought to the practiced politicians of the older parties. For years the average

¹ An editorial in *Times*, 1854, December 6, p. 4, is one of the fairest of the contemporary comments upon nativism and the causes of its expansion.



country voter had been subject to the management of local cliques or leaders, and had been forced to bear the restraints of party discipline. Now, silently, the bonds were broken-Before the mysterious potency of council caucus the plans of the old managers were shattered. As time went on the localelections throughout the state gave opportunity for the councils to use their influence. To the average voter there was a delightful humor in the situation when the local managers, after days of patient work in caucus and convention, found all their plans frustrated by the sudden appearance of some ticket which had not been heard of until the morning of election day. To many the Know-Nothing movement was a huge joke upon the community, harmless because thoroughly American, and useful because it broke up old cliques and promised the voter greater share in making nominations. With the aid of men who opposed the Seward leadership the Know-Nothing Order easily found a footing in many of the counties. Its councils easily picked officers from among men who had been drilled in secret work by the presence of other secret societies in the smaller towns. Under competent directors the secret assemblies, sitting mysteriously in secluded halls or lodge rooms, in stores, offices, barns or wherever else secrecy required, gathered the voters by thousands into secret conclaves. growth of the movement went forward without fluctuation or reverse.

In the first weeks of the campaign of 1854 the situation in state politics was confused. The fact that old parties were divided and weakened, the fact that new movements were organized for aggressive work, the fact that the fate of party tickets must depend upon concessions and combinations, all tended to obscure the future course of politics. On every hand the political workers and the party press waited with guarded utterance to see how events would shape themselves. Each party and each movement had declared for state conventions. At these conventions, presumably, the combinations would:

gradually reveal themselves. On July 12th the first one of this series of conventions, that of the Hard-Shell Democracy, was held, but its managers adopted a non-committal policy that did not clarify the political situation. As to temperance and nativism the platform was silent. As to anti-slavery, it was evasive. The state ticket named by the convention was one whose members were not committed in favor of or in opposition to the new issues that had come up. The convention left the Hard-Shell organization as devoid of official principles after as before it met. The half-party was playing a waiting game. Its nominees were practically free to adopt any principles which later expediency might suggest. On August 16th the anti-slavery movement was represented by the Anti-Nebraska convention, which met, debated and adjourned to a later date without naming a ticket. The proceedings of this session partially revealed the policy of the movement. The leaders contemplated naming a ticket upon which the anti-expansion and free-soil phases of anti-slavery could be united.3 The movement was intended to draw support from both the national parties. and to disregard old party lines, but the prominence of Seward Whigs in the convention made it reasonably certain that the movement would eventually aid the political plans of Senator Seward. On September 7th the convention of the Soft-Shell Democracy followed. It stood definitely and plainly in opposition to the three issues. By its disapproval of the temperance issue the half-party assured the favor of all who opposed restrictive legislation. By its disapproval of nativism it reassured the Irish vote. By its pro-slavery attitude it expressed faithfulness to President Pierce.

All eyes now turned to the Whig convention, which was to meet on September 20th. The adoption of nativism by the Silver-Gray faction was recognized, and it was understood that

¹ Tribune, 1854, July 13, p. 5.

² Tribune, 1854, August 17, p. 4.

^{*} Tribune, 1854, September 8, p. 5.

if the Know-Nothings could capture the Whig convention they would deal a blow to Seward's plans. The antipathy between Seward and the nativists was well known. Seward had on July 12th taken pains to denounce nativism in remarks made by him in the United States Senate. On the other side, the nativist leaders frankly denounced Seward as a demagogue who truckled to foreign influence for his own ends. "If there is anything dear to the hearts of the Know-Nothings," said one paper, after discussing the Seward clique, "it is to write the political epitaphs of the noted political leaders to whom we have alluded." The Whig state convention was to be the pivotal point of the campaign. If the Know-Nothings and their allies could control the convention, then Seward must accept defeat or else make a new party based on his anti-slavery movement. If the Know-Nothings should lose the convention then they must accept defeat or else seek new combinations. This latter emergency was supposed to be the one for which the Hard-Shell Democracy was waiting, and for which its leaders had held themselves non-committal on nativism.8 The press discussed a possible coalition of Know-Nothings, Hard-Shell Democrats, and Silver-Gray Whigs to defeat Seward. The very suggestion of such a union showed strikingly how the old ideas of party fealty had broken down. was a time of transition, in which parties were re arranging themselves. In the fore part of September the party delegates to the coming convention were elected throughout the state. Many of them were Know-Nothings, but at this point it became known that the rapid growth of the secret order had carried into its councils a considerable element of Seward Whigs who were not disposed to array themselves against that leader. When the returns came in from the district conventions it was found that although many Know-Nothings were among the delegates yet the convention would stand two to one in favor of Seward's

¹ Buffalo Commercial, quoted in Tribune, 1854, August 31, p. 4.

¹ Times, 1854, August 26, p. 4; Tribune, 1854, August 19, p. 5.

plans. It was probably in the short interval between the election of delegates and the meeting of the convention that the Know-Nothing managers in New York city decided to run a state ticket independent of all other parties. The Whig convention met at Syracuse on September 20th. The Know-Nothing forces went there unorganized. There seems, in fact, to have been no intention of making any serious opposition to the Seward interest. On the evening before the session began a caucus was held by the out-and-out Know-Nothings.1 There were only twenty-three of them, all from New York and adjacent counties. They failed to agree upon a nominee, and adjourned with the understanding that after the first ballot they should unite upon whatever member of the Order should have received the highest vote on the first ballot. Next day the convention organized and proceeded to vote on a nomination for governor. The Seward managers put forward Myron H. Clark, of Ontario, a member of the state senate, a supporter of Seward, a member of the Know Nothing Order, an advocate of temperance and a friend of anti-slavery. Clark's candidacy met general favor. the first formal ballot his name led the list, whereupon the nativist delegates fell into the current of the hour and helped his nomination. For lieutenant-governor the convention nominated Henry J. Raymond, of the New York Times, whose paper had steadily favored nativism in New York city. platform omitted all reference either to nativism or to temper-The Whig convention adjourned after a most peace-The political combination of Silver-Grays and ful session. Barker Know-Nothings had lost every point. At the same time the platform by mere silence made distinct concessions to nativist sentiment. It looked as if the unexpected might take place, as if the Seward clique and the Barker clique might find themselves working side by side to make Clark's elec-It was certainly no more marvelous for the Know-

¹ Times, 1854, September 20, p. 1; 1855, May 22, p. 2.

² Tribune, 1854, September 21, p. 1.

Nothing Order to support a Seward man than for the Seward men to support a Know-Nothing.

The effect of Seward's concessions to nativist sentiment was to keep on his side those Know-Nothings who had been friendly to him before, but not to change appreciably the attitude of his old opponents, the Silver-Grays, now become Know-Nothings. The machinery of the secret order was in control of the anti-Seward element, and not long after the Whig convention the call went out for a special session of the Grand Council at New York city on October 4th. Under the directions of Grand President Barker the district deputies of the Order were very busy during the month of September. Up to August 18th there had been 201 councils established. During the following weeks the efforts of the deputies raised the total, until by October 4th there had been no less than 563 bodies organized. Many of the new councils had naturally very few members. Nine men were sufficient under the law of the Order to constitute a council. Each one, whatever its membership, was entitled to its three representatives in Grand Council, and could cast as large a vote there as the older bodies with their hundreds of members. There is a possibility that this rapid growth of the Order was a natural one, but the opponents of the Barker clique ever afterward insisted that it was a device to pack the Grand Council for certain purposes. They pointed out that Barker selected the district deputies of the Order; that the district deputies selected the nine men who made up each new council; that five black-balls could defeat the admission of any who were against Barker, and that the council so nicely packed could send three delegates to the Grand Council to aid Barker's plans. These facts were all true, but the inference was unproven. There were certainly plans on foot before the Grand Council met, however, which contemplated a departure from the usual custom of endorsing nominees of the regular parties and proposed instead a sepa-

1 Times, 1855, May 22, p. 2.

rate nativist state ticket. Of this the proof is a report made in the Executive Convention of the O. U. A. on October 2d, which stated that a committee had been working for that purpose.¹ It may be mentioned that Barker, Ullman and others of the nativist leaders in New York city were members of Washington Chapter, No. 2, the largest, wealthiest and most influential of the O. U. A. bodies. To the general public this plan was not known. Men looked to see the Grand Council endorse for governor either Clark, the Whig nominee, or Bronson, the Hard-Shell nominee. Thus far the plans of Seward were most successful. The nomination of Clark by the Whig state convention had been seconded by the Temperance state convention, by the Anti-Nebraska state convention and by the Free Democratic state convention. Clark was the head of a coalition made up of the Whig Party and of two organized movements, and he was also a Know-Nothing himself, yet his election was doubtful if the secret order declared against him. Bronson, the nominee of the Hard-Shell Democracy, was credited with a desire for Know-Nothing support, which would put him into office, and with a willingness to pledge himself to secure that support. So, to the public, it looked like a choice between Clark and Bronson.

The Grand Council met on October 4th at Odd Fellows' Hall, in New York city. The first day and part of the second were taken up by the usual routine of organizing the grand body of a secret order. Credentials were received and doubtful claims decided. It was at this time that the existence of illegal councils began to be noticed. As a rule, they seem to have owed their existence to secessions from regular councils, or to informalities in their erection. The most notable case of this sort was the council at Canandaigua, in which Myron H. Clark held membership. This council was declared illegal, on the ground that its members had received the secrets of the Order from persons not authorized to give them, and that it de-

1 Executive Records of O. U. A.

sired recognition merely in order to advance the ends of political demagogues.¹ The declaration against the local council at Canandaigua had its real significance in the fact that it did away with all claims that Clark, as a member of the Order, was entitled to its support. After the roll was purged there were found to be 515 legitimate living councils. Had the Grand Council membership been full there would have been 1545 delegates. The actual attendance was 953 delegates, representing 460 councils. From the reports made by the members the strength of the Order at date was officially estimated at 73,860 men. As soon as the roll of delegates had been completed a committee was appointed to draft an address. Then the Council passed to matters political. First a resolution was offered to take no action on the matter of a state ticket. The suggestion was promptly voted down. Then came a resolution to form a separate state ticket, and this started a tumult which turned the Grand Council into pandemonium. Those who had expected the Grand Council calmly to assume the position of arbiter in state politics now saw that the leaders of the Order had determined upon quite a different course and were supported in their policy by a powerful element. An acrimonious and excited debate followed. Those who opposed a separate ticket were the Seward Whigs, who hoped for an endorsement of Clark; the Hard-Shell Democrats, who hoped for an endorsement of Bronson; and the conservative nativists of all factions, who did not wish the Order to develop into an independent party. Those who desired a separate ticket were the Soft-Shell Democrats and the Silver-Gray Whigs, both of whom feared the bias of the Council in favor of Clark. The vote of the Council carried the resolution in favor of a separate ticket, whereupon nearly onehalf of the delegates refused to take further share in the Council business and withdrew. After their departure matters went

¹ Herald, 1854, September 27, p. 1; October 27, p. 1; Courier-Enquirer, 1854, October 21, p. 2.

on more smoothly. A vote was at once taken on the nomination for governor, and Daniel Ullman, having received 256 votes out of 514 and having a plurality, was declared the choice of the Order. Ullman was present and promptly accepted the nomination. This closed the second day's session. On the third day the Grand Council named three other nominees for the state ticket and then adjourned. At some time during the three days' session a resolution was passed, evidently suggested by the fact of opposition to the new ticket and intended to counteract that opposition:

Resolved, That the clause contained in the second-degree obligation, which reads as follows, "And that you will vote in all political matters for all political offices for second-degree members of the Order, providing it shall be necessary for the American interest," requires every member of this Order to vote for candidates for charter and all other offices endorsed or put in nomination by the council of the ward or district for which such officers are to be elected, and every person violating this resolution shall be expelled from the Order.

This resolution was the first of the disciplinary laws which were enacted from time to time to stifle opposition to the central power. In a secret society the most effective way of disciplining a member is upon charges alleging a violation of the solemn pledge that the member has made to his brethren. Under the second-degree oath the member did not give up the right of private judgment as to the use of his vote, but this resolution interpreted that right away from him. The resolution was framed to permit the exercise of discipline over bolters. Its adoption shows interestingly how the Barker clique was grasping at power.

The ticket nominated by the Grand Council was a thoroughly respectable one, neither weak nor strong. The names which received a place on it were as follows:



¹ For details of Council session in addition to daily news reports: *Herald*, 1854, October 31, p. 1; *Times*, 1854, October 10, p. 2; October 23, p. 1; November 2, p. 4; 1855, May 22, p. 2.

² Text in Times, 1854, October 23, p. 4.

Governor Daniel Ullman of New York.

Lieut-Governor Gustavus A. Scroggs of Erie.

Canal Commis'r Josiah B. Williams of Tompkins.

Prison Inspector James P. Saunders of Westchester.

These nominees were selected to represent each one of the four factions of the older parties. Daniel Ullman was the best known man of the four. He was a New York attorney and a leader among the Silver-Gray Whigs. He had never held any important office, but had been high in party councils and had once been the Whig nominee for attorney-general. Of his capabilities for the chief place in the state government no denial was made by his opponents. Gustavus A. Scroggs was a Buffalo man and a Hard-Shell Democrat. Though scarcely known outside of his own county he was at home very popular as a local politician and as an officer in the state militia. His selection was made as a recognition of the western counties, where much of the Know-Nothing strength lay. Josiah B. Williams, nominee for the canal office, was a local capitalist of Ithaca and a state senator. He was a well-known Seward Whig, with a wide acquaintance in the southern tier of counties, but he had never posed as a representative of nativism. Williams held his nomination under advisement for some time, and then declined it about two weeks before election. The Know-Nothing managers then put in his place the name of Clark Burnham, of Sherburne, the regular nominee of the Hard-Shell Democracy. The insufficient time given did not permit the change to be widely known, however, and at the polls the Know-Nothing vote was divided between Williams and Burnham. The fourth man on the ticket, James P. Saunders, of Peekskill, was a nativist leader in the southeastern counties, but without a state reputation. He had many friends in the secret orders, and was put on the ticket for the additional reason that he represented the Soft-Shell Democracy. Political state conventions in forming tickets usually framed platforms on which

¹ Tribune, 1854, October 30, p. 5.

the tickets were to run. The Grand Council was not a convention in form and it made no platform, but it accomplished much the same thing in the adoption of an address to be read in the subordinate councils. This address was drawn up by a special committee and submitted to the Grand Council for approval much as a political platform might have been. It was a wordy piece of rhetoric, embellished with fragments of patriotic verse and containing in its whole length one issue only. This was the old issue of nativism, namely, opposition to the power of Romanism, which, according to the address, was seeking to divide the American people by encouraging party strife, in order that, having divided them, it might destroy their cherished institutions. Nothing was said about opposition to foreigners on the mere score of foreign birth.

With the adjournment of the Grand Council the managers of the nativist campaign took up the work of the hour. would seem that there must have been some sort of executive committee of the Order, but contemporary accounts have no reference to one. On October 11th the Executive Convention of the O. U. A. endorsed the Know-Nothing ticket and the executive committee of the O. U. A. extended its aid to the movement. The first great problem of the campaign was that of quelling the disaffection which had followed the action of the Grand Council. The delegates who had left the Council, angry at the nomination of Ullman, spread over the state stories of unfair action by the grand officers, of illegality and conspiracy in connection with the nominations. Here and there in the state letters came out in the press describing the Council session and scoring the alleged conspiracy of the Barker clique. This was the beginning of the break-down of the secrecy which had hitherto surrounded the work of the Order. Within a few days after the October Grand Council a meeting of disaffected Know-Nothings took place at Utica. A committee was there appointed to correspond with discon-

1 Text in Herald, 1854, October 31, p. 1.

tented councils and to organize a secession movement, with the object of forming a new Grand Council with the Barker clique left out. The committee began work at once and met encouragement. To meet the accusations made against them the grand officers now issued a formal circular² on October 17th, in which they officially denied all charges of unfairness or illegality in connection with the nominations. To these denials were added an appeal for campaign funds and a confirmation of Ullman's native birth. This official circular went to all councils, and, backed by the efforts of the friends of the ticket, did much to allay the discontent. The reference in the circular to Ullman's birth was called out by an attack on the ticket, charging that Ullman was not American-born. story originated in Jefferson county, and swiftly spread over the state.3 It related that Ullman was the child of German Jewish parents and was born in Calcutta; that as a school-boy in Jefferson county he could speak English only brokenly, and that as a student at Harvard he was accustomed to pose as a native of India. The intent of the story was to show that the Know-Nothings had made themselves supremely ridiculous by choosing a foreign-born person as their representative. Ullman's own answer to the tale was a denial and the production of affidavits showing that he was a native of Delaware. spite of all denials, the story and the gibe went the rounds all through the campaign, and the political nickname of Hindoos was fastened upon that branch of the Order which adhered to the Barker clique and its ticket. On October 26th the efforts of the Utica secessionists culminated in a convention of the discontented elements at Utica, which organized itself as a rival Grand Council.4 It passed resolutions declaring its op-

¹ Times, 1854, October 10, p. 1. ² Text in Tribune, 1854, October 25, p. 5. ³ Tribune, 1854, October 13, p. 4; Times, 1854, October 17, p. 4; October 19, 4.

⁴ Official report of meeting in *Herald*, 1854, November 4, p. 1. Full text of its new constitution and ritual in *Herald*, 1855, January 10, p. 2.

position to persons of foreign birth or Catholic faith. It elected grand officers, framed a new constitution, issued a formal address of justification and adjourned to another session in January. The leaders of the split declared themselves opposed to the making of separate nativist tickets, but thoroughly in favor of the nativist ideas. The following officers of the Grand Council were to hold until the annual meeting in January: State President, Alfred Cobb, of Syracuse; State Vice-President, Alexander Coburn, of Utica; State Treasurer, John F. Severance, of Walworth; State Secretary, Benjamin F. Romaine, of Albany. There were probably not over thirty councils engaged in this movement, and little notice was given it except by the Seward Whig press.

The great mass of the secret order upheld the regular organization, and the work of recruiting members went on cease-The Know-Nothing political work differed strikingly from the usual party methods in its disregard of newspaper The secret movement had no organs authorized to repre-There were perhaps a dozen papers in the state which favored the Ullman ticket for political reasons, but the Order relied for success upon its own efforts, that is to say, upon the literature that it printed and distributed, upon the speakers that it sent over the state and upon the ceaseless energy of the second-degree members. The Order spared no efforts to diminish the popularity of Senator Seward, for if it was to meet defeat it would be by the Seward forces. The most bitter enemies of nativism, therefore, were the Seward Whig newspapers, which eloquently denounced the wickedness of secrecy and proscription as features of political effort. The Democratic press of the state was far more courteous, recognizing in nativism a force that might aid Democratic ends by the overthrow of the Whig leader. At last, the coming of November brought the campaign to an end. When the results were

1 Herald, 1854, December 20, p. 1.

finally known by the official canvass it was found that the strength of the tickets was as follows:

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Clark-Raymond ticket:
  Whig Party (Woolly-Heads)
  Temperance movement (Temperance men) . . Anti-slavery movement (Anti-Nebraska men) . .
  Agrarian movement (Anti-Renters)
Seymour-Ludlow ticket:
  Ullman-Scroggs ticket:
  Nativist movement (Know-Nothings) . . . . } 122,000 votes.
  Unorganized Whigs (Silver-Grays) . . . .
Bronson-Ford ticket:
  Democratic Party (Hard-Shells) . . . . . .
                                                    44,000 votes.
Clark-Wood ticket:
  Anti-slavery movement (Free Democrats) . . . }
Anti-slavery movement (Republicans) . . . . . }
Goodel-Ward ticket:
  Anti-slavery movement (Liberty Party) . . . .
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The vote cast for the Ullman ticket did not represent exactly the membership of the Order. A percentage of the members refused to be bound by the action of the Grand Council and voted the regular Whig ticket. At the same time the Ullman ticket received a heavy vote from outside its ranks. In New York city the Protestant Irish supported it. In Albany the colored voters cast nativist ballots. When the polls closed on election night the excitement throughout the state was intense. So chaotic was the situation that none could guess how the result would stand. The earliest returns came from the cities and villages, and favored the nativist ticket so much that for two or three days it was believed that Ullman's election was accomplished. Then the returns from the rural sections began to arrive. Here the temperance issue had swayed voters more than nativism, and the votes for Clark and Seymour mounted. In the eastern part of the state Seymour had a decided lead, and as Ullman's prestige faded the success

¹ Official canvass in Times, 1854, December 21, p. 6.

of Seymour was applauded. Finally, eleven days after election, the vote of the western counties came in, and it was seen that Clark had an apparent plurality so small that nothing would be certain till the state canvassers did their work. When the state board finally passed on the returns, it declared the election of Clark by a plurality of only 300 votes. The Know-Nothing attempt to defeat Seward's nominee had failed. In spite of this failure the remarkable success that had increased the political strength of the nativist movement from 4.000 votes in 1853 to 122.000 in 1854 gave it new prestige. and the loss of the state did not check the rise of the secret order. The returns of the state showed that one-third of the Know-Nothing vote lav in the counties of the southeast, where nativist sentiment was real, and another third in the westernmost counties, where the Fillmore influence had been thrown The remainder was scattered. Following is the Ullman vote by counties, with his percentage of the total vote on governor:

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	Per Vote.	Per vote.
Albany	32 · · · 4.775	Herkimer 9 571
Alleghany	37 2,620	Jefferson 18 1,796
Broome	20 1,170	Kings 31 6,993
Cattaraugus	51 3,243	Lewis 4 151
Cayuga	28 2,459	Livingston 43 2,672
Chautauqua	50 4,519	Madison 4 277
Chemung,	38 1,613	Monroe 30 3,516
Chenango		Montgomery 9 475
Clinton		New York 27 16,588
Columbia	21 1,582	Niagara 32 1,882
Cortland	288	Oneida 6 1,068
Delaware	9 558	Onondaga 24 3,064
Dutchess	20 1,849	Ontario 43 3,148
Erie	50 7,712	Orange 1,790
Essex	12 493	Orleans 45 1,985
Franklin		Oswego
Fulton-Hamilton	-	Otsego 7 652
Genesee		Putnam 34 638
Greene	34 1,760	Queens 27 1,294

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Rensselaer 28 3/	077 Sullivan 23 866
Richmond 27	566 Tioga 23 1,019
Rockland 36	789 Tompkins 25 1,406
St. Lawrence II	947 Ulster 29 2,472
Saratoga 21 1,	733 Warren 46 1,408
Schenectady 17	525 Washington 29 2,025
Schoharie 18 1,	138 Wayne 21 1,516
Schuyler	101 Westchester 37 3,413
Seneca 37 1,	493 Wyoming 20 981
Steuben 50 5,	
Suffalls 42 04	

During the campaign little was said about the legislative seats which were to be filled by the election, but both the Seward men and the nativists worked over the field with some Both sides had a special interest in the next legislature because Seward would come before it as a candidate for reelection as United States Senator. The election returns showed that the greater part of the members would be Whigs, but as to how many would favor Seward no one could tell. When the Know-Nothing Grand Council met in New York city in its regular quarterly session on November 14th, its business was partly to organize Seward's defeat in the legislature, as well as to improve the political machinery of the Order as applicable to the work of a state campaign.¹ The outcry made against the Barker clique just before the state election had served one purpose in showing the objectionable features of too thoroughly centralized power in election work. There had been no use of the representative system in the executive work of the state campaign. To obviate that objection the Grand Council now created a state committee. consisting of four members from each one of the eight judicial districts of the state. This is interesting as the first step of an evolution which would ultimately reduce the Order to a likeness with the customary forms of political parties. In its time

¹ Official report of session in Times, 1854, December 4, p. 1; Herald, 1854, December 6, p. 1.

this first step was clearly a concession to the feeling that had grown up against centralized power. The members of the new state committee were as follows:

Joseph S. Taylor, Chauncey Schaffer, William Stokely and Joseph Souder, all of New York, Samuel H. Townsend of Suffolk, Luther Colwell of Rockland, William Taylor of Westchester, William B. Cozzens of Orange, H. O. Lansing of Albany, H. M. Wetherbee of Columbia, J. T. Hendricks of Ulster, S. W. Brittan of Rensselaer, Stephen Sammons of Montgomery, Martin Myers of Schenectady, William A. Russell of Washington, E. K. Huested of Saratoga, Randolph Barnes of Jefferson, J. Ostrander of Herkimer, J. D. Miller of Oswego, William S. Palmer of Onondaga, W. T. Huntington of Tompkins, James Wright of Tioga, T. C. Grannis of Chenango, John Palen of Delaware, Samuel J. Crook of Livingston, H. F. Hatch of Monroe, J. R. Stearns of Cavuga. Stephen V. R. Mallory of Ontario, Erasmus D. Rodman of Erie, Philip S. Cottle of Chautaugua, Alexis Ward of Orleans. A. Stearns of Genesee.

Another piece of legislation by the Grand Council was the creation of "the test" which elaborated the discipline of the secret system. This was a formal and summary proceeding to discover and punish political treason. It consisted in calling any person before the body in which he held membership and requiring him to reply with uplifted hand to such questions as might be put to him regarding his vote. Its general object was to purge the Order of malcontents and uncertain voters. for the answers given under the test were suitable basis for a vote of expulsion. With the resolutions which created the test were others which prescribed its use. The officers of the Grand Council were to test each delegate and the Council was to expel such members as did not rightly answer. would purify the governing body of the Order. The tested delegates were then to return to their several councils and make inquiry as to whether the district-deputies had worked for the Ullman ticket. Such deputies as had not done so were to be reported to the grand-president, who was at once to remove them and make new appointments. Each districtdeputy was then to visit the several councils in his care and to make inquiry as to how each council had acted, reporting all objectionable ones to the grand-president, who would at once revoke their charters and dissolve them. purge the executive system. In each council in the state any member might be expelled if self-convicted by the test. sweeping inquest, which reached into every council and touched every member of the secret order, is an interesting hint of the perfection to which the machinery of such a society could be brought. The test was at once put into effect upon the delegates in the Grand Council. Then the delegates went home to continue the work. Soon there were outbreaks of wrath and expostulation from councils which feared the operations of this new discipline. Know-Nothings in Brooklyn met to denounce the test formally and to spread broadcast the text of their protest. The work was done. however, despite objections, and the Order gained strength by The nativist system was never more unified in discipline and control than now, when its managers prepared to throw their strength into the legislative contest over the choice of a United States senator.

The state legislature convened on January 3rd. By this time it was known that there were some forty-five members of the legislature who were members of either the Know-Nothing Order or the O. U. A. Could they be organized, the number was sufficient to defeat the hopes of Seward. With the opening of the legislative session, accordingly, Albany became the center of political intrigue and pressure in reference to the senatorship. The managers of the Know-Nothings relied much on the pledges which members had made to the secret orders. Instructions from Know-Nothing-

1 Text in Tribune, 1854, December 7, p. 7.

councils and O. U. A. chapters, all leveled against Seward, poured in upon those legislators who held secret affiliations.2 There was also a lobby against Seward. The November session of the Grand Council had recommended that the councils in each assembly district should unite in sending an agent to Albany. The duties of such agent were not defined by the Council, but it was understood that he was to organize all possible pressure upon the assemblyman over whom he watched. Probably such an elaborate lobby never existed before or since in New York state. Moral suasion also had its place in the Know-Nothing schemes. Under the title of "Stanhope Burleigh," a novel had been written by C. Edwards Lester* under the pseudonym of Helen Dhu. Among its characters were recognizable the personalities of Seward, Weed, Greeley, Hughes and other enemies of nativism. Intermingled with the love story of the heroine the novel told under its fictitious names how the ambitious Whig leaders had bartered their loyalty to American institutions for Catholic votes, and how the Catholic conquest of America was to follow. A copy of this novel was sent to each legislator to influence his vote.3 In addition to these influences there was the preaching of the Albany State Register, which had been adopted as the new state organ of the secret order, by the new state committee on December 30th.4

On the part of the Seward men there was no lack of effort. Rumor declared Thurlow Weed to be the master-mind of the Seward forces. If the Know-Nothings had aroused comment by their unusual methods, their opponents were not less interesting, for one of the factors brought in by them to aid the election of Seward was the secret nativist order of the

¹ Tribune, 1855, February 7, p. 5; February 9, p. 4.

³ Tribune, 1855, March 3, p. 4; June 18, p. 5.

³ Herald, 1855, January 29, p, 4; February 5, p. 2.

^{*} Tribune, 1855, January 20, p. 4.

Utica Know-Nothings. The Utica secessionists who had revolted against the Barker clique had abated not a jot from the anti-foreign and anti-Catholic principles of the motherorder. Yet in January, 1855, the delegates to the secessionist Grand Council were found in Albany as lobbyist friends of the anti-nativist and pro-Catholic Whig leader. The Grand Council had been called to meet on January 10th at Schenectady, a place selected, many thought, because of its nearness to the state capital. There were about 125 delegates on hand, representing some fifty councils. The grand body passed a series of resolutions declaring for temperance, nativism and anti-slavery, and then adjourned, while its members hastened to Albany.1 The Seward men nursed this branch of nativism in order, apparently, to make prominent the fact that not all Know-Nothings were opposed to Seward. Another factor in the senatorial contest was the temperance question. The fate of a prohibitory law lay in the hands of the Seward clique, and although the Know-Nothings strove for the favor of the temperance legislators the Whig clique had the advantage.

All through the month of January the work of intrigue went on. During the weeks of waiting the skill of Seward's friends detached one after another from the mass of opposition. Finally, by a fusion of Seward men, Silver-Grays, Democrats and nativists they had a clean majority in joint session. Then the contest was precipitated. In the legislative caucus held to nominate, so large a vote was cast for Seward that the nativist opposition gave up the fight at once. On February 6th the formal election took place. Seward received eighty-five votes, four more than a clear majority. The Know-Nothings had been out-generaled. Seward's success was a bitter experience for the nativists, the more so because there had been some premature boasting over his expected over-

¹ For this session: *Herald*, 1855, January 10, pp. 2, 4; *Times*, 1855, January 11, p. 8, January 30, p. 1₀

throw. The anger of defeat blazed up a little here and there and then died down, biding its time. Twelve Know-Nothings had voted for Seward in the legislature and thirty-seven of his supporters were said to have been under nativist pledges.¹ Some of these were expelled from the secret bodies to which they belonged and others were merely made uncomfortable. But whatever vengeance might be wreaked upon his friends, Seward was safe for six years more.

1 Names given in Herald, 1855, February 6, p. 4.

CHAPTER VI

THE INTRUSION OF THE SLAVERY ISSUE, 1854-1855

WHILE the Know-Nothing Order in New York state was battling with Seward for supremacy, a new and alluring prospect was opening to the ambitions of the Order. All over the nation the new nativist movement had been greedily seized upon by political leaders whose purposes seemed likely to be subserved by it, and all over the nation, too, the voters had been charmed by the patriotism and the mystery of the society. From Maine to California, north, east, south and west, the federated secret councils were grasping power and looking forward to greater conquests. Already boasts were heard that the votes of the Order would make a president in 1856. The national leaders of the older parties stood aghast at the rising tide which threatened to sweep away both them and the old issues that they represented. Another national political issue, however, was also struggling for position. Anti-slavery feeling, inflamed by the Nebraska struggle of 1854 and aggravated by the border troubles in Kansas, was also being seized upon by practiced politicians and moulded for political purposes. In the North a bitter and aggressive anti-slavery movement based itself on moral sentiment and sectional jealousy. In the South a bitter and aggressive proslavery sentiment based itself on the Southern fear of social and industrial revolution. Both north and south a large conservative element sought for escape from this issue. Until the fall of 1854 anti-slavery and nativism had been neither friendly nor antagonistic. In some states, as in New York. circumstances might put anti-slavery leaders and nativist

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leaders in opposing camps, but in others, as in Massachusetts, the reverse might be true. The two issues were so distinct in character that they naturally stood unrelated.

Such was their actual position when the National Council of the secret order met on November 15, 1854, at Cincinnati, to legislate for the society. The business of the session was the revision of the secret ritual, but at the same time politics were to be informally prominent.1 It was plain that the older parties were now breaking into fragments and that the nativist movement was heir-apparent to their power. Presidential possibilities were asking for recognition thus early, and foresighted leaders in the Order were bent on paving the way for its control of the national government. If the plans of the leaders were to succeed the Order must wield influence in both North and South. This was the source of nativist hostility toward anti-slavery, for the latter issue was above all things sectional and disruptive. If the nativist policy were tainted with anti-slavery the Order could not hope to carry a single Southern state nor to control the Union. Of the inside history of the Cincinnati Council session very little news came to the outer world. It was learned in a general way that the Council carried out a revision of the secret ritual, including the oaths of the three degrees. It was reported that the delegates devoted some of their time to talking over the merits of presidential possibilities. It was rumored that the Southern members demanded some action that would secure the Order from the control of the anti-slavery men and that they were gratified. Much more than this was learned, however, after the Council had adjourned and its work had been reported to the state councils for referendum vote. The facts came out in a bitter wail from the anti-slavery element, protesting against the new oath of the third degree. The new oath, in form, merely affected to condemn a disruption of the nation, and to this idea no good



¹ On this session see *Herald*, 1854, November 16, p. 1; November 25, p. 7; December 20, p. 1; December 28, p. 1.

American could object. The sting of it lay in the fact that it gave the conservative element and the pro-slavery men a means of suppressing the anti-slavery idea by using the discipline of the Order against its advocates. It is worth the while, at this point, to give the Know-Nothing oaths in full. Several versions of oaths, purporting to be those of the secret order, were published by the hostile press during the period of Know-Nothing activity, but the only ones which seem clearly authentic are those which date from the Cincinnati revision. The oath of the first degree, taken by all members of the Order, was administered as follows:

In the presence of Almighty God and these witnesses you do solemnly promise and swear that you will never betray any of the secrets of this society, nor communicate them even to proper candidates, except within a lawful council of the Order; that you will never permit any of the secrets of this society to be written, or in any other manner to be made legible except for the purpose of official instruction; that you will not vote nor give your influence for any man for any office in the gift of the People, unless he be an American-born citizen, in favor of Americans ruling America, nor if he be a Roman Catholic; that you will in all political matters, so far as this Order is concerned, comply with the will of the majority, though it may conflict with your personal preference, so long as it does not conflict with the Constitution of the United States of America or that of the state in which you reside; that you will not, under any circumstances whatever, knowingly recommend an unworthy person for initiation, nor suffer it to be done if in your power to prevent it; that you will not under any circumstances expose the name of any member of this Order, nor reveal the existence of such an association; that you will answer an imperative notice issued by the proper authority, obey the command of the state-council president or his deputy while assembled by such notice, and respond to the claim of a sign or a cry of the Order, unless it be physically impossible; and that you will acknowledge the State Council of as the legislative head, the ruling authority and the supreme tribunal of the Order in the state of acting under the jurisdiction of the National Council of the United

¹ A set of oaths said to have been used in Virginia in 1854 may possibly be those actually used by the Order before the Cincinnati ritual. They are given in *Tribune*, 1854, August 10, p. 6, and *Herald*, 1854, August 12, p. 3. The Cincinnati oaths as used in Pennsylvania are given in *Times*, 1855, April 30, p. 2. Those of the 1st and 2d degrees are also reported from Warsaw, N. Y., in *Tribune*, 1855, April 17, p. 5. That of the 3rd degree is also reported from Ohio in *Times*, 1855, June 9.

States of North America, binding yourself in the penalty of excommunication from the Order, the forfeiture of all intercourse with its members, and being denounced in all the societies of the same as a willful traitor to your God and to your country.

The assent to the obligation of the first degree was made in these words: "All this I voluntarily and sincerely promise, with a full understanding of the solemn sanctions and penalties." The first-degree oath was designed merely to control the voting citizen. The second-degree oath went further and bound the taker as to his policy if advanced to public office. It was administered as follows:

You and each of you of your own free will and accord, in the presence of Almighty God and these witnesses, your left hand resting on your right breast and your right hand extended to the flag of your country, do solemnly and sincerely swear that you will not under any circumstances disclose in any manner, nor suffer it to be done by others if in your power to prevent it, the name, signs, pass.words or other secrets of this degree, except in open council for the purpose of instruction; that you will in all things conform to all the rules and regulations of this Order, and to the constitution and by-laws of this or any other council to which you may be attached, so long as they do not conflict with the Constitution of the United States, nor that of the state in which you reside; that you will under all circumstances, if in your power so to do, attend to all regular signs or summons that may be thrown or sent to you by a brother of this or any other degree of this Order; that you will support in all political matters, for all political offices, members of this Order in preference to other persons; that if it may be done legally you will, when elected or appointed to any official station conferring on you the power to do so, remove all foreigners, aliens or Roman Catholics from office or place, and that you will in no case appoint such to any office or place in your gift. You do also promise and swear that this and all other obligations which you have previously taken in this Order shall ever be kept through life sacred and inviolate. All this you promise and declare as Americans to sustain and abide by, without any hesitation or mental reservation whatever. So help you God and keep you steadfast.

The third degree, after the Cincinnati Council, was often called the Union degree on account of the clauses added to it having reference to the Union. These were the innovations against which the anti-slavery men protested so vigorously. The oath was administered in the following words:

You and each of you, of your own free will and accord, in the presence of Almighty God and these witnesses, with your hands joined in token of that fraternal affection which should ever bind together the states of this Union—forming a ring in token of your determination that, so far as your efforts can avail, this Union

shall have no end-do solemnly and sincerely swear that you will not under any circumstances disclose in any manner, nor suffer it to be done by others if in your power to prevent it, the name, signs, pass-words or other secrets of this degree, except to those whom you may prove on trial to be brothers of the same degree, or in open council for the purpose of instruction; that you do hereby solemnly declare your devotion to the Union of these states; that in the discharge of your duties as American citizens, you will uphold, maintain and defend it; that you will discourage and denounce any and every attempt coming from any and every quarter which you believe to be designed or calculated to destroy or subvert it or to weaken its bonds, and that you will use your influence, as far as in your power, in endeavoring to procure an amicable and equitable adjustment of all political discontents or differences which may threaten its injury or overthrow. You do further promise and swear that you will not vote for any one to fill any office of honor or profit or trust of a political character, whom you know or believe to be in favor of a dissolution of the Union of these states, or who is endeavoring to produce that result; that you will vote for and support for all political offices Third or Union degree members of this Order in preference to all others; that if it may be done consistently with the constitution and laws of the land, you will when elected or appointed to any official station which may confer on you the power to do so, remove from office or place all persons whom you know or believe to be in favor of a dissolution of the Union, or who are endeavoring to produce that result; and that you will in no case appoint such persons to any political office or place whatever. All this you promise and swear upon your honor as American citizens and friends of the American Union, to sustain and abide by without any hesitation or mental reservation whatever. You also promise and swear that this and all other obligations which you have previously taken in this Order shall ever be kept sacred and inviolate. To all this you pledge your lives, your fortunes and your sacred honors. So help you God and keep you steadfast.

The action of the Order in throwing down the gauntlet to the anti-slavery men did not, at the moment, seem impolitic. Both north and south there were thousands of thinking men who saw danger in the slavery agitation and who would gladly have seen it buried under the weight of some less dangerous issue. It was this element that was eagerly and hopefully turning to nativism as an escape from an impending dilemma. The action of the National Council at Cincinnati was a bid for the support of the conservative element of the nation. In New York state the new oaths were very acceptable to the nativist managers because they added a point in the contest with Seward. The old-time nativist argument that Seward

should be defeated because he favored foreigners and Catholics was now reinforced by the new doctrine that he should be defeated as an enemy to the Union. Among the rank and file and lesser leaders there were some defections as a result of the action at Cincinnati, but not sufficient to be serious. Many who left the Order at this time in New York city attached themselves to kindred societies of nativism, more especially to the "Allen branch" of the Order and the American Star Order. The "Allen branch" was that portion of the Order which dated back to the split of 1852. When the dual order was consolidated in May, 1854, one of the ward councils in New York city refused to coalesce. It remained independent, organized itself as a Grand Council, and took up anew the work of expansion. Increased by new members and by withdrawals from the main society, the "Allen branch" in December, 1854, possessed 153 councils in New York and 30 in New Jersey. The main branch of the Order always recognized a kinship with the smaller body, but it was the special boast of the latter that it maintained the original principles and methods of the organization. The American Star Order was the society of the "Wide-Awakes" founded by William Patten and prominent in the street-fights of New York city. Originally composed mainly of minors, it received an older element into its ranks during the latter part of 1854. growth of these two societies in the metropolis was another sign of that disaffection toward the policy of the ruling clique which had already brought the Utica branch of the society into existence in the interior. The problem of managing political nativism was complicated by these secessions. Cincinnati ritual, which was one of the causes of the changes, was nevertheless accepted and ratified by the Grand Council of the main body at a special session held in New York city in January.*

¹ Courier-Enquirer, 1855, March 18, p. 2; Herald, 1854, December 20, p. 1.

² Tribune, 1855, January 11, p. 4.

The New York managers now faced the work of placing the Order in New York state upon the new political platform without further impairing its strength. At this particular time the senatorial contest was in full swing. Until February 6, 1855, the energies of the Order in New York were all directed toward the defeat of Seward, and the feeling which was aroused against the great exponent of anti-nativism and anti-slavery made it easy to consolidate the sentiment of the Order in favor of the policy embodied in the third degree. spite of the numbers in New York city who went over to the lesser societies, the accessions of new members continued to increase the strength of the main body of the Know-Nothing organization. It is impossible to say whether or not this was due in any large measure to the influence of the Cincinnati ritual as a bid for the conservative support. Probably the splendid executive machinery of the Order is more entitled to the credit of the expansion. As the spring election of 1855 drew near the local Whig and Democratic leaders through the state tried to hold the usual party caucuses, but, if held at all, they proved in many cases to be the veriest farces. The organized nativists of the smaller towns manipulated the regular party caucuses to accommodate the plans of the secret Know-Nothing councils. Bitter feuds grew up within the local parties as a result of secret politics. Then, from the latter part of January onward, the interior cities and villages showed the phenomenon of local abandonment of the old Whig and Democratic systems. Voters ranged themselves in the local elections as Know-Nothings or Anti-Know-Nothings. and fought out the issue of secret politics at the polls. results, reported in the daily press, showed the honors of success to be about equally divided. This rapid gain of strength in the interior of the state went on far into the spring months, but it was hardly matched by a corresponding increase in New York city, where the results of the recruiting system had about reached their limit by the spring months of 1855. But in New York city, too, the Barker clique planned to increase Know-Nothing strength by capturing the American Star Order and using it as an adjunct to the greater organization.

Everything was favorable to nativism in New York state when the Grand Council met in annual session at Syracuse on February 13, 1855. The Order now included 960 councils and about 142,000 members. About 2,000 delegates, representing 910 councils, appeared at the Syracuse session. On the first day the Council organized itself and imposed the test on certain of its members. Seward's election had taken place only a week before, and there was much soreness over the event. One unlucky delegate who, as assemblyman, had helped to elect Seward, was mobbed and driven from the council hall.* On the second day the Council listened to the president's annual address. Barker commented hopefully on the growth of the Order, spoke of the test and its good effects in ridding the society of the unfaithful, endorsed the neutral policy of the Cincinnati session and recommended the adoption of a new state constitution by the Council. The annual election followed the address. President Barker was again chosen to office, as were also Secretary Farrington and Treasurer Taylor. In the vice-presidency Ambrose Stevens, of Genesee, superseded Ebling. On the third day the Council debated on a new constitution. The secret order in New York state was at this time working under the constitution adopted at the consolidation of the society in May, 1854, but the extraordinary growth of the organization had made that instrument open to criticism. Not only was it inadequate for the political work of a state campaign, but its centralizing provisions had begun to irritate the interior counties. At the special session of the Grand Council in January, 1855, the adoption of a new

¹ For this session see *Herald*, 1855, February 18, p. 3, February 19, p. 1; *Times*, 1855, February 27, p. 4. Text of Barker's address in *Herald*, 1855, March 7, p. 8; *Times*, 1855, March 8, p. 8.

² Herald, 1855, February 18, p. 3; Courier-Enquirer, 1855, February 23, p. 2.

constitution had been recommended, and a committee selected to draft it." The report of this committee was now ready for discussion by the Grand Council at its annual session, and it was subjected to lengthy debate. The Council voted to open the membership of the Order to native-born Protestants of foreign parentage. It voted to limit the president's power by placing the selection of district deputies of each county in the hands of the delegates of the county assembled for that pur-It voted also to reduce the membership of the Grand Council to one delegate from each subordinate council. Eventually, however, after voting the reforms, the proposed constitution was laid over to the next quarterly session. After electing delegates to the National Council the Grand Council adjourned on the 15th. The press reports of the session do not indicate that the slavery question played any part in its proceedings.

After the annual meeting the Barker clique, secured in power for another year, turned to the conquest of the Order of the American Star. Of its success in this effort the details may be told as part of the history of the state campaign. All the organizing work of the Order was, of course, done as secretly as was possible. Its open work consisted only of continued agitation in all parts of the state against the influence of the foreign-born Catholic element. The latter was for a time cowed by the strength of the nativist movement, and endured quietly the opprobrium cast upon it. Efforts were made by the nativist movement, also, to secure legislation, but with little success. The proposal to disband all foreign-born militiamen 2 was put aside by the legislature, as was also the proposal to require twenty-one years of residence for naturalization. The bill to deport foreign paupers and criminals was lost. The one successful piece of legislation was

¹ See Barker's address.

² Text of petition in Herald, 1855, February 15, p. 8.

the bill on church tenures, which gave lay trustees a voice in the control of church property, and which was contrary to the Catholic custom of episcopal control. It was in reference to this bill that Erastus Brooks and Archbishop Hughes had their famous controversy over the amount of church property held in the archbishop's name. The argument went on through a long series of letters in the daily press. It was very pointed, sometimes even violent, and closed with the friends of both sides claiming victory. These letters placed Senator Brooks before the public as one of the great champions of nativism, and made him later a leader of the movement for which he had worked. On the whole, the secret organization of the Know-Nothings did not attract attention during the spring of 1855 except when it showed its work in the local elections or when the press chronicled the sessions of the Grand Council.

On May 8, 1855, came the regular quarterly session of the Grand Council, held at Syracuse and lasting three days. President Barker reported 1060 councils with about 178,000 members, and this, he admitted, was close to high-water mark. The work of expansion was now practically done. It could not be expected that many new councils would be added in the future, and the treasury of the Order must be filled by some means other than the fees which had filled it in the past. The new constitution must also be completed, he said. The former methods of making local nominations by convention were open to objection, and it would be well to adopt some system that could bring the voters into closer touch with the selection of candidates. The reform in the selection of district deputies had been begun by him. some counties he had appointed a deputy for each assembly district and all deputies were now appointed on recommenda-

¹ Controversy between Senator Brooks and + John.

² For session see Times, 1855, May 9, 10, 11, 12; Herald, 1855, May 13. Text of Barker's address in Herald, 1855, May 16, p. 4.

tion of those over whom they were to exercise authority. Also, he recommended a declaration of principles which would show where the Order in New York state stood. He phrased his ideas as follows:

First, Americans shall rule America. Second, The Union of the States.

Third, No North, no South, no East, no West.

Fourth, The United States of America, as they are, one and inseparable.

Fifth, No sectarian influence in our legislation or the administration of American laws.

Sixth, Hostility to the assumptions of the Pope, through the bishops, priests and prelates of the Roman Catholic church, here in a Republic sanctified by Protestant blood.

Seventh, Thorough reform in the naturalization laws.

Eighth, Free and liberal educational institutions for all sects and classes with the Bible, God's Holy Word, as a universal text-book.

President Barker's suggestions were generally followed by the Council. The new constitution received final form. It was voted that each county should make nominations in such manner as it might choose. The declaration of principles was formally endorsed. This declaration embodied the neutral policy set forth at Cincinnati in the new third-degree oath. The act of the New York Grand Council in adopting it marks the complete success of Barker in harmonizing the state organization with the national policy of the Order. The work was easy in New York because the anti-slavery element, weighted down by its friendship for Seward, had been practically eliminated from the Order by the agency of the test before the new policy came up for consideration.

In other states of the Union the secret order was less happily conditioned. In several of the northern states the anti-slavery element in the Order was strong and ill-disposed to stand neutral on the great slavery issue. In Massachusetts the anti-slavery men controlled their Grand Council and refused to ratify the Cincinnati ritual. In several other grand

1 See Barker's address.

councils the slavery question was dragged into debate and provoked factional divisions. As the June session of the National Council drew near, it was clearly seen that several northern states would send to it delegates more or less violently anti-slavery in opinion, while the southern states would send representatives no less violently in favor of proslavery ideas. Under these circumstances a conflict in the national body was certain unless good management could avert it. On June 5, 1855, the National Council met at Philadelphia, with President Barker in the chair and every state in the Union represented by delegates. For New York appeared James W. Barker, of New York, Thomas J. Lyons, of Orange, L. Sprague Parsons, of Albany, Stephen Sammons, of Montgomery, Selah Squires, of Chenango, Stephen V. R. Mallory, of Ontario, and Horatio Seymour, Jr., of Erie. In the work of organizing the Council the suspicious attitude of the South showed itself, and the delegation of the District of Columbia was admitted to the floor in order to placate the South by balancing the free-state and slave-state representation. President Barker's annual address referred disapprovingly to the anti-slavery issue. On June 8th the election of officers made E. B. Bartlett, of Kentucky, the National President of the Order. Barker was a candidate for re election, but was set aside in favor of a man more closely linked with Southern interests. In these earlier days of the Council. then, the Southern members showed their intention of dominating its action to guard their interests. All looked anxiously forward to the report of the committee on platform, which would precipitate a conflict, if conflict there were to be. All through the earlier days of the session there was active political discussion among the delegates, and by the time the matter of principles came up for formal action the conservative delegates had mostly been swept out of neutrality into one

¹ This account is made from *Herald* and *Tribune* reports. Text of Barker's address in *Herald*, 1855, July 2, p. 3.

or the other of the aggressive factions. Unfortunately there was no master-mind or guiding clique to quell the storm. On June 11th, instead of a report on platform, the Council received reports from the committee on resolutions, which brought the crucial question before it. There were two reports. majority report, drawn up by Burwell of Virginia, embodied the pro-slavery ideas, while the minority report was distinctly in opposition. Then the contest began. The debate which began on the 11th lasted all through the 12th and 13th. The North and South were fairly pitted against each other. Secrecy as to the contest was impossible, and the daily press of the nation chronicled day by day its progress. The small conservative element in the Council tried to turn aside the trouble by a compromise, but the resolution which Raynor, of North Carolina, introduced for that purpose was promptly killed. Late on the 13th the Council rejected the minority report and accepted the majority report. This act decided that the national policy of the Order, so far as the National Council could declare it, was to be pro-slavery in character. The text of the Burwell resolutions was as follows: 1

Resolved, That the American Party, having risen upon the ruins and in spite of the opposition of the Whig and Democratic Parties, cannot be held in any manner responsible for the obnoxious acts and violated pledges of either; that the systematic agitation of the slavery question by those parties has elevated sectional hostility into a positive element of political power, and brought our institutions into peril: It has therefore become the imperative duty of the American Party to interpose for the purpose of giving peace to the country and perpetuity to the Union; That as experience has shown it is impossible to reconcile opinions so extreme as those which separate the disputants, and as there can be no dishonor in submitting to the laws, the National Council has deemed it the best guarantee of common justice and future peace to abide by and maintain the existing laws upon the subject of slavery as a final and conclusive settlement of that subject in spirit and in substance.

Resolved, That, regarding it as the highest duty to avow these opinions upon a subject so important in distinct and unequivocal terms, it is hereby declared as the sense of the National Council that Congress possesses no power under the Constitution to legislate upon the subject of slavery in the states or to exclude any state.

¹ Text in Tribune, 1855, June 15, p. 5.

from admission into the Union because its constitution does or does not recognize the institution of slavery as a part of her social system; and expressly pretermitting any expression of opinion upon the power of Congress to establish or prohibit slavery in the territories, it is the sense of this National Council that Congress ought not to legislate on the subject of slavery within the territories of the United States, and that any interference by Congress with slavery as it exists in the District of Columbia would be a violation of the spirit and intention of the compact by which the State of Maryland ceded the District to the United States, and a breach of the national faith.

On the morning of the 14th came the sequel to the victory of the pro-slavery men. Led by the Massachusetts delegation the Northern members met in caucus, every free state except New York being represented. One of the most outspoken anti-slavery delegates, Henry Wilson, of Massachusetts, was made chairman. Under his leadership the caucus formulated an "Appeal to the People," which declared the principles of its signers to be nativism and anti-slavery. Many of the anti-slavery men then abandoned the Council session and left the city. This action of the minority was hailed at the time as the first revolt of the North against Southern dictation." The anti-Southern newspapers delightedly described the incident as a split in the secret order. In this they were hardly correct, for no delegate to the National Council could, by his individual act, bind the Grand Council which he represented, and a secession of members merely left certain states unrepresented. It did not sever such unrepresented states from the Order. Not all the Northern members left the session, indeed, after the caucus of the 14th. Many remained in their seats and the Council went on with its work. The formal platform of the Order was now adopted. It was a long document in which the text of the Burwell resolutions was incorporated as the twelfth section.3 It was under the phrase of "the twelfth section" that they were afterward mentioned in discussions.

¹Text of Appeal in Tribune, 1855, June 15, p. 5.

² Times, 1855, June 15, p. 4.

^{*}Text of platform in Herald and Tribune of 1855, June 16.

The Council ordered a session on July 4, 1856, to nominate a presidential ticket, and provided a basis of representation for it. Adjournment finally took place on June 15th. This session was the turning-point in the fortunes of the secret order as a national power. The pro-slavery men, by their insistence, had written the doom of the movement and thrust aside a golden opportunity to avert the calamities of the future. Henceforth the slavery issue dominated national politics unchecked.

The course followed by the New York delegation in the Philadelphia session had been throughout friendly to the South. The explanation of this lies in the fact that New York had two aspirants for the presidential nomination of 1856. Millard Fillmore, of Buffalo, ex-president of the United States and former head of the Silver-Gray faction of Whigs had in 1852 been the favorite of the New York nativists for the presidency, and had in 1854 helped the secret order to its splendid growth in New York state by throwing his influence in its favor. Early in 1855, having previously remained outside of the secret order, he became a nominal member and a candidate for nomination as president. George Law, of New York city, was a wealthy contractor, new to politics, but popular, ambitious, liberal and likely to take well with the voters if lucky enough to get a nomination.² He began his canvass in February, 1855, and was sedulously "boomed" by several newspapers of the state. With presidential ambitions to be promoted, the course of the New York managers was plain. They must court the favor of the South or nativism could not carry a presidential election. The Know-Nothing Order had made great progress in the Southern states, welcomed as an organization which was thoroughly opposed to sectional ideas. The attitude taken in the North by its anti-

¹ Times, 1856, March 3, p. 3, August 5, p. 3.

Biography, three columns, in Herald, 1855, June 2, p. 1.

slavery members and the fact that the Order had been noncommittal on the slavery issue had of late, however, caused the movement to be viewed by the South with distrust. It was on account of this distrust, apparently, that the Know-Nothings lost the Virginia election of May, 1855, just before the Philadelphia session.1 It certainly seemed best at the moment to side with the element which demanded assurances favorable to slavery, and New York did so. In a presidential election the thirty-five electors of New York, backed by the 120 votes of the slave states, could seat their candidate. Of course the Order could not be sure of all the Southern states, but since the North was divided on the slavery question that side of the controversy was to be favored which seemed least sectional. When the anti-slavery men of the National Council drew apart in caucus the New York delegation held aloof and voted for the pro-slavery platform. It must nevertheless have been offensive to some of them. The close of the Council session brought Barker and his friends back to New York with a new problem on their hands. They had before this crushed out anti-slavery in the Order and had successfully put the society organization on a platform of neutrality as to the slavery issue. Now they must go still further and make the Order in New York state plainly pro-slavery to agree with the national platform.

No time was lost in beginning the work. On June 18th, in response to a call signed by the seven delegates of the National Council, an immense mass-meeting was held at New York in City Hall Park.² This action committed the secret order in New York city to the new platform. Of the steps taken to swing the interior counties into line no record remains. The Order was by no means unanimous in favor of the pro-slavery platform. Here and there were heard expres-

¹ Herald, 1855, May 27, p. 4.

² Full reports in Herald and Tribune.

sions of dissent. A few councils surrendered their charters and disbanded. Others protested but remained faithful. general the Order remained quietly waiting developments. was noticeable that in New York state there was no special Grand Council session called to consider a ratification of the action taken at Philadelphia. In other states where the grand councils met for this purpose there was a general breaking away from the established principles of the secret system. Massachusetts openly seceded.1 Other states began to alter their secret systems at their own discretion without any regard to the national unity of the Order The Philadelphia session was, as the New York Tribune gleefully said, "the beginning of the end" of the secret national nativist movement, Ohio some seceders from the Know-Nothing Order organized a rival order, and under the name "Know-Somethings" strove for national expansion, but their movement failed to attain strength although it secured a foothold in several states. On August 21st the committee of correspondence which had been created at the bolters' caucus during the Philadelphia session issued a call for a gathering of anti-slavery Know-Nothings at Cincinnati on November 21st, the object being a re-organization of the secret movement on an anti-slavery Meanwhile, amid all these reports of changes and disintegration, the New York organization was held quiescent, looking forward to the regular quarterly session of the Grand Council in August, when the matter of politics must necessarily be discussed. During the weeks that intervened between the Philadelphia session and the August Council the sentiment of the Order had time to shape itself, guided, of course, by the local leaders. It was in this time that there began in New

¹ Text of address in *Herald*, 1855, June 30, p. 1.

³ Tribune, 1855, August 11, p. 5.

⁸ Tribune, 1855, January 17, p. 5.

Text of call in Tribune, 1855, August 31, p. 6.

York city an earnest and determined opposition to the power of the clique headed by James W. Barker. The slavery issue mingled itself with this movement of dissatisfaction and aided in weakening Barker's influence in the Order. A factional division thus developed itself quietly, having on one side the Barker clique and the southeastern counties, while in opposition stood the old leaders of the Silver-Grays, supported by the interior districts. The Barker clique stood for ratification of the Philadelphia platform, while the opposition element favored frank concessions to the growing anti-slavery sentiment in the state.

The Grand Council eventually met August 28, 1855, at Binghamton, with a small attendance of delegates.' On the first day, after organizing, it selected places for the next Council session and for a state nominating convention. the second day the matter of the platform came up. In the morning a report was received from the delegates who had represented the Grand Council at Philadelphia and the subject was then referred to a special committee on platform. At the evening session this committee brought in its report. Almost unanimously the committee turned its back on the pro-slavery program of the Philadelphia session, and held the order in New York state to the old policy of neutrality. The two resolutions in which its position was specially declared were phrased, one in a way to please the anti-slavery men and the other in a way to please the opposite group. This platform as reported by committee was at once accepted by vote of the Council. On the third day of the session the Council created a new state committee, composed of one member from each senatorial district, and then adjourned. The significance of the Council's action on the platform was a little vague in most ways. It was a skillful effort to satisfy

¹ Tribune, 1855, August 29, p. 5.

² This account is from *Tribuse* reports.

both sides of the slavery controversy. The fact was evident, however, that the refusal to accept the Philadelphia platform meant a defeat for the Barker clique, a severance of open alliance with the South, and practically, though not in so many words, a repudiation of the pro-slavery position of the National Council. The platform as adopted by the Binghamton Council was modeled upon that previously adopted at the May Council, but was more explicit on the slavery question. It follows:

First, Americans to rule America.

Second, The maintenance of the Union and the compromises of the Constitution faithfully fulfilled.

Third, The absolute exclusion from the creed of the American Party of all sectional doctrines that are against the sense of any portion of the American Union, and the disuse of the name, influence or organization of the American Party to advance any measure against the constitutional rights of the states, or the intention or effect of which shall be to endanger the perpetuity of the Union.

Fourth, No sectional³ interference in our legislature, and no proscription of persons on account of religious opinions.

Fifth, Hostility to the assumptions of the papal power through the bishops, prelates, priests, or ministers of the Roman Catholic church as anti-republican in principle and dangerous to the liberties of the people.

Sixth, Thorough reform in the naturalization laws of the federal government.

Seventh, The enactment of the laws for the protection of the purity of the ballot box by the state.

Eighth, Free and reliable institutions for the education of all classes of the people, with the Bible as a text-book in our common schools.

Resolved, That the national administration, by its general course of official conduct, together with an attempt to destroy the repose, harmony and fraternal relation of the country in the repeal of the Missouri compromise, and the encouragement of aggression upon the government of the territorial inhabitants of Kansas, deserves and should receive the united condemnation of the American people, and that the institution of slavery should derive no extension from such repeal.

Resolved, That in the organization of the American Order the institution of involuntary servitude was and now is regarded as local and not national in its character, a subject for the toleration of a difference of opinion by the citizens of the northern and southern states, and as such has no rightful place in the platform of the national American Party.

¹ Text of platform in Tribune, 1855, August 30, p. 4.

¹ Query: Sectarian?

This platform did not show any new developments in the policy of the secret order, but rather a maintenance of its old endeavor to keep nativism to the fore as its one real basis of effort. The Order stood for compromise and peace on the slavery issue. The real significance of the Binghamton platform in the history of the Order was its recognition of the fact that the organization must not go too far in defiance of anti-Southern sentiment. In other words the nativist movement, with all its splendid machinery, was not strong enough to disregard the anti-slavery movement. Heretofore, the two issues had been rivals in New York politics, with nativism foremost. Now the tide was turning and anti-slavery was taking the lead.

CHAPTER VII

THE STATE CAMPAIGN OF 1855

THE break-down of the old Whig and Democratic Parties in New York state which began in 1854 was continued through the state campaign of 1855. Before the aggressive action of new issues embodied in specially organized movements the old partisan fabrics exhibited such disruption and weakness as seemed to foretell their utter extinction. The Know-Nothing organization stood out above all forces in the early months of 1855 as a force destructive of old methods in politics. vitality was astounding. It had at its service an enthusiasm such as few political parties could hope to meet in their own. It was sleepless, ubiquitous, cunning and aggressive. In the fall elections of 1854 it rivaled the older parties in its strength. In the local spring elections of 1855 it overtopped them all and forced its opponents to unite in sheer self-defense, regardless of party names. It stood, in the spring of 1855, easily the most powerful single political body in the state. Next to it in strength stood the Democratic Party. The dual organizations of the Soft-Shells or administration men and the Hard-Shells or anti-administration men still faced each other in the spring of 1855 with unaltered stubbornness, each claiming to be the true representative of the old party. The dismembered party was losing voters to the organized movements continually, but yet it had a vitality and hopefulness that made it a strong factor in state politics. There was just a possibility of a re-union of the factions for campaign work, and in such event the Democracy, despite its losses, might be stronger than organized nativism.

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Outside of the Know-Nothing Order and the disorganized Democracy there was no one strong aggressive force in the field in the early spring of 1855, but political prophets were not deceived by appearances. Men knew that out of the less powerful organizations of the day the skillful leaders of the old Whig Party would build up a coalition of some sort that would be strong enough to make at least an effort toward control of the state. The material for such a coalition was to be found in the organized temperance movement, the Whig Party system and the chaotic anti-slavery movement. The temperance movement was bound to the Seward clique by its obligation to repay the favor of a prohibitory liquor law enacted in April, 1855. The Whig Party was bound to the Seward clique by the fact that the latter held control of its machinery. The anti-slavery movement was bound to the same clique by the lack of any other leaders on whom it could rely for success. Of these forces which stood ready to Seward's hand probably the strongest in the spring of 1855 was the organized temperance movement. Encouraged by the winning of a prohibitory law and militant against a threatened repeal, the organization was capable of showing important results in a state campaign. Its strength lay, of course, largely in the smaller villages and towns. Next to the temperance movement as a political force was the Whig organization, which was now only a remnant of the old party. Of the two factions which existed in 1854 one was absorbed into the nativist movement and the other was rapidly dwindling into nothingness. The party as it stood was a weak affair, but its name was a valuable asset and carried with it the control of some thousands of votes. The anti-slavery movement was not strong in organization in the spring of 1855, though anti-slavery sentiment was widespread in the community. The two organizations of the Anti-Nebraska men and the Free Democrats which had shared in the campaign of 1854 still retained in 1855 a vague form of embodiment but their platforms needed alteration to fit the

more recent phases of the slavery question. Such as they were, however, the two groups were natural allies of the Seward interest.

The state offices to be filled at the election of 1855 were not of unusual importance, since neither the governorship nor the senatorships of the state would depend upon the result of the election. The significance of the campaign lav, therefore, not so much in the offices at stake as in the prophecy which it would hold of the coming events of 1856, the presidential year. The disruption of parties which had been taking place in New York state was no local phenomenon. The same change was going on all over the Union. Everywhere the party systems were going to wreck in consequence of faction fights and the inroads of new issues. Organized nativism intended to put a presidential ticket in the field in 1856 and seemed destined to success. The Democratic Party undoubtedly would survive its trials and also have its regular national ticket in the field. Less fortunate, the Whig Party could not hope to cope with either of its rivals unless a miracle could turn back the tide of disruption and unite its membership upon a real issue. The Nebraska matter and the Kansas struggle kept the slavery issue before the nation during 1854 and 1855. All through the North there was a strong antislavery feeling. Before the winter of 1854-55 was over men were beginning to talk of a great anti-Southern political movement. In New York state it was sometimes said that Senator. Seward would look to such a movement for a presidential nomination in 1856. Under these circumstances the vote cast by the respective groups in the state of New York in 1855 would be an important hint of what that pivotal state might be expected to do in the presidential contest of the following year. It might have been foretold, therefore, that the state campaign of 1855 would be a struggle in which the chief figures would be organized nativism pitted against a Seward coalition.

Within the first six months of 1855 the political leaders began to marshal their respective forces into line. The nativist movement was represented chiefly by the Know-Nothing Order, but there were some thousands of nativist voters outside of the Order. The secret Order of United Americans had possibly 30,000 members scattered all over the state, but most numerous in the south-eastern counties. The secret Order of the American Star had probably not over 5,000 voters, almost wholly in New York and Kings counties. secret society of the "Allen Know-Nothings" had an unknown number of voters in New York city. The secret American Protestant Association and kindred societies also had their members. Barker and his friends were able to exercise influence in nearly all these groups. The American Star was reorganized wholly. When Patten, the founder of the society, left the city, the leadership of it fell to Jacob B. Bacon, an ally of Barker. Then a plan was carried out in which the society was re-formed on the Know-Nothing model.¹ It became a federation of "temples," governed by a grand temple. political work was directed by a board composed of the five chief officers of the grand temple. Its declared mission was in part to "act politically with the great national American Party, aiding to elect its candidates and working to carry out its principles." In April, 1855, the society had eighty-four temples and 10,000 members, not all of whom were voters.* About the same time that the American Star was re-organized a plan was set on foot in the O. U. A. to re-organize its executive system into a form similar to that of the Know-Nothings. There seems no direct evidence that the Barker clique were the movers in this plan, but it coincided curiously well with their policy. The proposed innovation contemplated a fed-

¹ Pamphlet in Gildersleeve Coll., and reprint of same in *Tribune*, 1855, September 5, p. 7, gives ritual complete. *Times*, 1855, September 5, p. 1, September 6, p. 2, also gives ritual. *Times*, 1855, October 20, p. 2, gives constitution.

³ Times, 1855, October 20, p. 2.

erated group of "executive associations" controlled by certain persons who would possess an "executive degree." executive associations were to be composed of voters recruited from the ranks of the Order. The plan was an elaboration of the previously used O. U. A. machinery. On April 24th, the grand executive committee recommended the new scheme to Arch-Chancery, and in May the Executive Convention took like action.1 Arch-Chancery, in August, permitted the new system to be tried. While the three chief secret societies of the nativist movement were thus approaching a common model, their forces were also being welded together into harmony in political action. During May and June there were sessions in New York city of delegates from all the nativist societies, and their work culminated on July 13th in a convention which marked the local beginning of an American Party separate and distinct from any one secret organization. August 28th, when the Grand Council put into effect a new feature of organized nativism by ordering a state nominating convention, its action similarly showed a tendency to break away from the old secret system and create an open party system which could enlist the votes of those nativists who might not approve the secret system. As yet, however, there was no suggestion that the Know-Nothing Order itself give up its secrecy.

The Seward coalition was also built up during the early months of 1855 with anti-slavery sentiment as its source of strength. On May 30th the former anti-Nebraska movement was revived under the name of "Republican." This name of "Republican" was in frequent use all through the North during the growth of anti-Southern feeling. The name was used at various times, in various states, by various sorts of organizations, whose various principles agreed generally in the one particular of opposition to Southern interests. In New York state the name was formally assumed in September, 1854, by

¹ Executive records of O. U. A.

a group in the anti-Nebraska convention who wished to make the movement plainly bi-partisan in character. Their wishes were disregarded, and they seceded, creating a Republican organization, and then merging with the Free Democracy. At the same time the name was also assumed by the anti-Nebraska convention in a motion hastily carried during the excitement of its closing hours, and scarcely referred to during the campaign that followed the convention. It was by virtue of that motion that the committee appointed by the convention of 1854 made its bow in May, 1855, as representative of the new Republican movement devoted to the Seward interest. The transformation and revival of the former anti-Southern organization made no stir whatever, nor was there any surprise when, on July 18th, the Republican state committee and the Whig state committee met together and called conventions to meet on the same day in September. All this had been foreseen. It was merely the drawing together of the Seward forces. Close following the coalition of Whigs and Republicans came other steps in the Seward program. On July 25th the state committee of the temperance movement met and issued a convention call to take effect on the day following the Whig and Republican conventions. This meant an endorsement by the temperance movement of Seward's nominees. Next, on July 31st, the representatives of two secret political societies met at Rochester and arranged for action in support of the new Republican movement. Finally, on August 16th, the Free Democratic state committee called upon its followers to join their efforts in aid of the Republican organization. This completed the structure on which the Seward interest would base its hopes.

The part taken by secret societies in this work of fusion is not at all important, but it had its interesting features. The two societies concerned were the so-called "Choctaws" and

1 Tribune, 1854, September 28, p. 6.

the "Know-Somethings." The Choctaws were those Know-Nothings who seceded from the main order in October, 1854. and duplicated the secret system. They did not claim over 150 councils in 1855, and probably had much less. principles included opposition to slavery, and they were supporters of Seward. The Know-Somethings were members of a secret society started in Ohio in January, 1855, by Know-Nothing seceders.* In principles it was mildly nativist and emphatically anti-slavery. In organization it followed very closely the Know-Nothing model, except that it had but one degree, and substituted a pledge in place of an oath. The Know-Something Order won a foothold in New York state, probably in June. 1855, and was fostered by Seward men as a bait to draw off members from the Know-Nothing society. It had a grand lodge, of which William C. Parsons was chief officer with the title of grand president. The Order failed, however, to make any headway against the overwhelming strength of the Know-Nothing system. As a nativist organization it was a sham, for its real interest lay in anti-Southern agitation. On July 31st, in response to official calls, the Grand Council of the Choctaws and the Grand Lodge of the Know-Somethings met at Rochester, agreed together on a platform and voted to unite at a future session into one society.3 Together they called a convention of delegates from their subordinate bodies to meet at the same time and place as the Republican convention. These allied societies voted at their Rochester session to eliminate from their rituals all hostility to foreigners. The only nativist principle which they retained was that of hostility to clerical influence in civil affairs. Practically they abandoned nativism at Rochester when they revised their principles.

¹ Name appears in Tribune, 1855, March 16, p. 5.

³ On its origin see *Tribune*, 1855, January 17, p. 5, March 7, p. 6, March 24, p. 6; *Herald*, 1855, January 20, p. 3, January 29, p. 8, March 10, p. 2, June 14, p. 1.

⁸ Herald, 1855, July 25, p. 4, July 28, p. 1, September 22, p. 2.

The plans of the Seward clique were fairly well revealed by the end of July, and the public turned with interest to the two Democratic state conventions which were to take place in There had been some hints of schemes to draw the separated Democratic factions into union, and no one was sure that the schemes had failed. In case the faction leaders agreed upon alliance the Democracy might yet control the state. At the same time there was a possible coalition of Hard-Shells and Know-Nothings to be looked for. was persistent in referring to this possibility.¹ It was clear enough that if the Hard-Shells held aloof from other factors in the state campaign they could not hope to win any of the state offices, whereas if they could reach an agreement with the nativists they might gain a share of the spoils without losing their factional identity. There were no principles to stand in the way. Nevertheless when the Hard-Shell convention met on August 23d, it was found that the organization had decided to hold its own course in the state campaign, making concessions to nobody. In the platform there was incorporated a paragraph that in mild terms condemned nativism. few days later the Soft-Shell state convention also declared against nativism. This was expected, since the Soft-Shells were dependent on the foreign vote. Both of the dual bodies of the Democracy thus kept clear of the taint of nativism in their platforms, but the coming election was to show that the Hard-Shell voters took a different attitude. The August Grand Council of the Know-Nothings added to their platform a resolution condemning so heartily the policy of President Pierce that it could not but enlist Hard-Shell sympathy. was claimed several months later, but without good proof, that the Hard-Shell managers, while condemning nativism openly, at the same time supported it quietly in the state campaign.

The month of September brought about the successful launching of the new Republican movement. The Seward

1 E. g., Times, 1855, August 14, p. 4.

men all over the state generally abandoned the use of the old worn-out Whig organization as soon as the word was passed to place the new Republican movement on its feet, and in this work they were aided by Democrats of anti-Southern feelings. This ready co-operation of former antagonists was due to the work wrought by organized movements in teaching men how to belong to a party and yet act with organizations outside of party lines. The Republican movement was not at first a real party. It was a bi-partisan organization created primarily to voice anti-Southern feeling, and secondarily to crush organized nativism. Men might join the new movement without feeling that they thereby lost membership in the older parties. ing September the work of organization went on under the direction of the state committee. Local mass meetings created local committees and chose delegates to the coming state convention. A Republican press appeared and aided the work of recruiting by its vigorous efforts to build up anti-Southern sentiment. Thanks to the energy of the press the desired sentiment grew rapidly. The attention of the voting masses was now drawn to the slavery issue more closely than it had ever been before.

If it be possible to set any definite time as the point where the nativist movement in New York state reached its height and began to decline, that time must be fixed in the month of September, 1855. A claim was made for it about this time that it possessed in the Know-Nothing Order alone at least 185,000 votes.¹ This claim, though entirely unofficial, was yet probably very close to actual fact, for the Order had reported 178,000 members in the previous May. Nevertheless despite its enormous membership, nativism had reached the turning place. Henceforth the movement was to lose strength steadily year by year until its end. The cause of its changing fortune lay partly in itself and partly in the character of its antagonists. Organized nativism in New York state had risen

1 Herald, 1855, July 29, p. 4.

to strength at a time when there was no organized issue of like vitality which could dispute its growth. In 1854 neither temperance nor anti-slavery had the ability to win men as nativism did, nor could the broken party organizations oppose it successfully. In 1855 the situation changed. The antislavery issue, re-organized and aggressive, again appealed to the voters, and this time won the recognition that it demanded. The re-organization of the anti-slavery movement was the turning point for organized nativism. But it was partly in the nativist movement itself that the cause of its decline lay. success had been an element in its own undoing. The knowledge of the power that lay within its secret mechanism brought into its membership a horde of petty leaders more intent upon personal success than upon the unity of the society. Intrigue, rivalry and wrangling developed in the councils, and petty spite or open-voiced disgust were here and there tearing aside the veil of secrecy that had heretofore concealed the Order's inner workings. The mechanism, membership, teaching and aims of the great Know-Nothing society could, in the campaign of 1855, be easily learned by any anxious inquirer. nominal principles of the movement were losing their influence, too. The old cry of Catholic conspiracy against the nation was beginning to lose its effect, for it was seen that the enemy—if he really were an enemy—was in a great minority in the nation. Besides, the Catholic bishops had officially declared in May, 1855, that Catholics owed no obedience to the Pope in civil affairs. Finally, the mystery of the thing was beginning to vanish. In 1854 the Order was really clothed in secrecy, and could work out startling political changes at the polls, but by the fall of 1855 outsiders could in most towns guess closely at the strength and plans of the secret councils.

The Know-Nothing state ticket of 1855 was placed in the field in a manner less open to objection than that of 1854. The resentment aroused by the nomination of the Ullman ticket bore home its lesson to the managers of the Order, and

by the fall of 1855 they had prepared the nominating machinery of a state convention. The first convention met at Auburn on September 25th. It was composed of delegates elected for the single duty of making nominations, and it was governed by officers chosen by itself. This convention is another instance of the way in which the secret order continually adopted party methods in its political work, abandoning the peculiar methods by which it had hitherto secured its best results. According to the press reports there were about 320 delegates in attendance on the Auburn convention.1 They were called to order by Grand President Barker as temporary chairman, and thereupon began the work of self-organization. Erastus Brooks was chosen as permanent president, supported by eight vicepresidents, representing the judicial districts of the state. The work of nomination immediately followed. This convention was not a Grand Council session. It was a temporary political body with a special work to do. Press reports give little detailed convention news. There were many aspirants for place, but one by one the list was sifted, and the convention broke up in the early morning hours of the 26th. This Auburn convention, with its commonplace political procedure, comes just at the turning point of the fortunes of political nativism. It is of special interest because it marks a certain change in the conception of the nativist movement in the state. Up to this time the Know-Nothing Order had been the one acknowledged force of political nativism. The Auburn convention did not, however, regard itself as merely a Know-Nothing gathering. It affected to represent political nativism as a whole. The phrase of "American Party" had been occasionally used in nativist politics before the date of the Auburn convention. After that date it is almost exclusively the official name of the nativist movement. The ticket selected by the convention was as follows:

1 Convention account from Times and Tribune.

Secretary of State Joel T. Headley, of Orange.

Comptroller Lorenzo Burrows, of Orleans.

Treasurer Stephen Clark, of Albany.

Attorney-General Stephen B. Cushing, of Tompkins.

Engineer Silas Seymour, of Rockland.

Canal Commissioner Samuel S. Whallon, of Chautauqua.

Prison Inspector William A. Russell, of Washington.

Judge, Court of Appeals . . William W. Campbell, of New York.

Judge, Court of Appeals . . . George F. Comstock, of Onondaga.

This ticket was so chosen as to represent all portions of the state and to be bi-partisan. Five of its members had been Whigs and four had been Democrats. Against the personal character of its members the opposition press had nothing to say. Joel T. Headley, of Newburgh, the head of the ticket, was one of those nativist legislators who fought valiantly against the election of Seward as senator. In earlier life he had been a clergyman, but left that occupation to travel and to earn his living with his pen. Up to the time of his election as assemblyman he was best known as a writer. His legislative career then secured him notice in politics. Lorenzo Burrows, whose office was perhaps the most important on the state ticket, was a business man of Albion, credited with wealth and ability. He had served one term in Congress. Cushing, Whallon, Campbell and Comstock were lawyers of local reputation. Seymour and Clark were civil engineers of considerable experience.

On the day following the nativist state convention the delegates of the Seward coalition met at Syracuse. Three separate conventions were held at once, namely, those of Whigs, Republicans and Know-Somethings. The proceedings of these bodies went on smoothly. The Whig and Republican joint-committee reported a mixed ticket made up of Whigs and Democrats, and all three conventions promptly ratified the selections. Excellent as this arrangement was for the Seward clique there was nevertheless a patent incongruity in asking Whigs to vote as Whigs for men chosen from the party-

which the Whig organization had fought so bitterly during the past twenty years. There was something of a stir of dissatisfaction when the mixed ticket was declared. The Republican movement, it must be again said, was not yet a real party. The men who composed it were still Whigs and Democrats, and the fact that some Democratic politician might feel willing to side with anti-slavery did not make him palatable to straightout Whigs even when served to them upon the official ticket of the Whig Party. Nativism took advantage of this anomaly in party work to stir up dissatisfaction with the Seward ticket. In New York, Kings and Richmond counties the nativist element was strong enough to use the Whig Party machinery at this juncture. The Whig county committees repudiated the Republican ticket, and on October 4th an immense massmeeting in New York city called for a new state convention of Old-line Whigs. The Seward-Whig newspapers viewed this threatened revolt with wrath and fear, but their fear was needless, for it was an impossible task to re-create the machinery of the old party in time for election. On October 23d, when the state convention of Old-line Whigs met, it merely made its protest against the Syracuse mixed ticket and did not attempt to make a rival ticket or re-organize the state. The old Whig Party in New York was in fact a political corpse. Whigs as would not join with Seward now drifted into nativism, though for a year or two longer the pretence of an Oldline Whig state committee was kept up.

The nativist campaign work in 1855 followed very largely the former policy of secrecy in the interior counties. Voters were gathered into the Know-Nothing councils and instructed as to the necessity of upholding the political plans of nativism. In New York city the more open methods of mass meetings, campaign clubs and processions were used. In the arguments of the time, nativism still used the old bugbear of Catholic conspiracy, and with excellent effect. The twin bugbear of for- \ eign influence, independent of church matters, was tacitly

dropped. Nativism had come to recognize the value of foreignborn voters by this time, and there was little said of the old idea of twenty one years' residence for naturalization. Nativism was growing liberal. Its platform of August made no explicit reference to the foreign-born, but contented itself with a vague hint of some sort of reform in naturalization laws. arguments of the campaign were those upon the slavery issue. Nativism could not now go so far as to declare that the South was right, but it could and did maintain that Seward was wrong. Senator Seward, according to the nativist view, was a mischief-maker, heedless of results so long as his own ambitions were served, plotting for the presidency, and not caring if his course might imperil the unity of the nation. nativist demonology. Seward the Friend of the Pope was superseded by Seward the Enemy of his Country. The slavery issue really was the dominant note of the state campaign. On the Republican side of the contest the leaders used the longtried methods of political work, drawing together the machinery of a new state organization, but keeping fast hold on the old Whig system as well. In argument they scored the nativist idea. Hostility to voters of foreign birth, they said, was an insult, and hostility to the Catholic system was an absurdity. As to the slavery issue, they said that the nativists were friends of the South and of domestic servitude. The nativist leaders were bamboozling their followers and blinding them with fanciful mummeries to suit their own ambitions and to deliver the national government into the hands of the slave holding aristocracy. Sometimes there were reproaches against the iniquities of "dark-lantern politics;" but this came with bad grace from the Seward side where the secret Know-Something Order, after swallowing up the Choctaws, kept the field as a Seward auxiliary of the same dark-lantern type.

Election day in 1855 came on November 6th. The first re-

¹ Herald, 1855, September 22, p. 2; Times, 1855, October 12, p. 5.

turns showed that organized nativism had won a victory. The Republican movement polled a remarkably good vote, but it fell short of success. Nativism carried the state. The victors elected seven administrative officers, one judge of appeals, and five judges of the Supreme Court. The land office and the canal board, with the patronage therewith connected, would be theirs in the coming year. In the legislature the nativist success was not so apparent. Neither branch of that body would be dominated by the movement. There were only eleven nativist senators and about forty-four nativist assemblymen. The state canvass showed that the political groups of the campaign had polled an averaged strength about as follows:

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Headley Burrows ticket:
 Whig Party (Old-line Whigs) . . . . . .
King-Cook ticket:
 Anti-slavery movement (Republicans) . . .
 Anti-slavery movement (Know-Somethings) .
 Whig Party (Seward Whigs) . . . . . .
 Temperance movement (Temperance men)
Hatch-Stetson ticket:
 Democratic Party (Soft-Shells) . . . . . . . . . . 90,900 votes.
Ward-Mitchell ticket:
 Ward-Stetson ticket:
 Democratic Party (Half-Shells) . . . . .
 Anti-temperance movement (Constitutionalists) .
 Anti-temperance movement (Liquor Dealers) .
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The returns for this election showed that the nativist movement had gained considerably since the fall of 1854. A heavy vote was cast for its ticket in some of the staunch Democratic counties. Curiously, however, the counties of the west, where Fillmore's influence extended, did not vote as heavily for nativism in 1855 as in the preceding year. The secret order had invaded the northern counties since 1854, and its gains

¹ Official canvass in *Times*, 1856, January 2, p. 1. The Liberty Party, whose state poll was about 140 votes, is omitted.

there and elsewhere more than balanced all losses. In five counties the nativist ticket had an actual majority of the total vote. The vote for Headley was distributed as follows:

	Per cent. Vole.		Per cent. Vote.
Albany	41 6,136	Onondaga	31 3,479
Alleghany	23 1,429	Ontario	. 43 2,744
Broome	18929	Orange	. 24 . 1,806
Cattaraugus	34 2,012	Orleans	. 44 1,831
Cayuga	37 3,076	Oswego	. 29 2,413
Chautauqua	44 3,564	Otsego	. 25 . 1,958
Chemung	29 I,092	Putnam	. 37671
Chenango	33 2,276	Queens	. 32 1,461
Clinton	37 1,576	Rensselaer	49 5,350
Columbia	32 2,173	Richmond	
Cortland	35 1,541	Rockland	. 48., 982
Delaware	35 2,102	St. Lawrence	. 25 2,167
Dutchess	23 2,098	Saratoga	. 35 2,671
Erie	35 • • 5:433	Schenectady	. 52 . 1,534
Essex	52 1,928	Schoharie	. 29 1,606
Franklin	54 1,831	Schuyler	. 27 780
Fulton-Hamilton	29 1,089	Seneca	. 36 1,285
Genesee	36 1,570	Steuben	. 40 3,400
Greene	45 2,167	Suffolk	
Herkimer	32 2,024	Sullivan	. 49 2,223
Jefferson	12 1,090	Tioga	. 10 440
Kings	34 7,113	Tompkins	. 45 2,163
Lewis	9 318	Ulster	. 56 5,096
Livingston	47 2,704	Warren	. 48 1,513
Madison	24 I,575	Washington	. 53 3,715
Monroe	31 3,522	Wayne	. 32 2,388
Montgomery	39 2,058	Westchester	. 39 3,264
New York	36 20,367	Wyoming	. 18 868
Niagara	38 2,247	Yates	. 7 254
Oneida	11 1,555		

The success in the state election was encouraging to the Know-Nothing Order, and yet the total vote cast was 30,000 less than the membership which had been claimed for the Order in the spring months. The election gave evidence that organized nativism was really menaced by the rise of the Republican movement. Its power was beginning to shrink as

that of organized anti-slavery grew. The latter was taking on strength with a rapidity almost equaling that which nativism itself had shown at its first expansion. In the coming winter it would be represented in the legislative bodies of the nation, and would demand recognition as a factor in national politics.

All eyes now turned expectantly to the meeting of Congress. In New York state an almost equal interest was directed toward the meeting of the new state legislature. The attitude of the Know-Nothing Order of New York state toward the anti-Southern movement was now changing very 1 rapidly. The Barker clique with its friendship for the South was losing influence. A new element was forcing itself to the front in the Order with friendly feelings for anti-slavery. two elements were in balance, and while they remained so, New York stayed faithful to the old secret system and kept itself coherent and united. The Order in New York lent no countenance to the schismatic national convention which met at Cincinnati in November, 1855, composed of anti-Southern men, but held itself to old ways. The first evidence of the change worked in New York by the anti-Southern movement revealed itself when Congress met on December 3d and began to ballot for a speaker. It was then seen that although at least half of the New York congressmen had been elected in 1854 by Know-Nothing votes, yet only a half dozen were now inclined to act with the Order in the speakership contest. The whole Know-Nothing element in Congress soon showed an utter lack of coherence and power. At the first ballot on the speakership it mustered about fifty votes, but they were divided between the Southern Marshall and the Northern The Americans, as they now called themselves. could not unite. On the 28th ballot Marshall withdrew. Efforts were made then to get the Know-Nothings together in support of Fuller. Slowly his following increased through the weeks of repeated balloting that extended themselves into the winter months, but the incessant fight upon the slavery

issue continually weakened the nativist phalanx. The situation at Washington, consequently, was not at all encouraging to the New York portion of the Order when the new year of 1856 came in. The Know-Nothing members from New York were reflecting no luster whatever upon the organization which placed them in their seats, and the whole Know-Nothing group in the House was showing itself utterly incapable of harmony.

On January 1, 1856, the New York legislature came together. Here, as at Washington, there was an aggressive group of Republicans prepared to struggle for political status. Their movement was yet new and had not shaken itself entirely loose from the older parties, but they meant to assert themselves in the organization of the legislature. were at Albany, as at Washington, several political groups which overlapped one another in personnel and whose respective strengths could not on that account be accurately reckoned. In a rough way only could it be said that the new Assembly of 120 members was fairly evenly divided among Democrats, Americans and Republicans. On the last day of the old year the members held their caucuses. The Americans selected Lyman Odell, of Livingston, as their candidate for speaker of the lower house. Then on the New Year the balloting began. In the contest at Albany, unlike that at Washington, the bitterness wrought by the slavery issue had no place. The problem at Albany for each of the three chief groups was to get the speakership if possible, but first and above all things, to show no weakness in its coherence. For nativism in New York, a fiasco like that at Washington would be a most evil omen. For two weeks, with dogged persistence, the rival groups faced one another at Albany. Then, on the 49th ballot, the Democrats and Republicans, without merging their identity in the least, united to outvote the Americans and divide the offices between themselves. This defeat, brought about by coalition, lost no prestige to

the Know-Nothings, who had proven their ability to hold together. Meantime, at Washington, efforts were being made to create a coalition of Democrats and Americans to outvote the Republican group, but the Americans would not unite upon this final hope. Then came the break. Southern Know-Nothings passed over to the Democracy and only a corporal's guard remained to vote for Fuller till the end.

The utter weakness of the Know-Nothing contingent at the national capital was but a reflection of the actual condition of the national organization. Nearly every state had altered the old Know-Nothing secret system to suit its own taste since the fatal session of the Philadelphia National Council in June. 1855. There was no longer a national secret society. Instead there was a congeries of state organizations, some in the form of societies and others in the form of political parties. talked less of "the Order" now, and more of "the party." The old Know-Nothing Order was in fact, in a transition stage. It was changing itself into a real political party. Many were dropping away from it during the change, yet it still had probably over a million voters and could make a fight for the presidency. Its leaders were planning for the latter event, and the National Council which had been called to meet on February 18th, would try to rehabilitate the organization and set it in the field in fighting form. What part the slavery issue would play in this work of restoration no one could prophesy. Anti-slavery sentiment in the organization was much stronger than it was eight months before, when the former National Council was held, and in the new Council it would probably be more strongly assertive than before. The anti-Southern men would have an advantage, too, in the fact that each congressional district would have a delegate and there could be no careful balancing of state delegations as in the former Council. The Know-Nothings of New York looked forward to this Council with peculiar interest because of the two aspirants for the presidency. All through the year 1855 the friends of

Fillmore and of Law respectively were pushing their canvass for delegates. Fillmore himself was in Europe, but the men who had come over to the Know-Nothing Order from the old Silver-Gray Whig faction rallied to his name. Law, on the contrary, found his support among the men who were more closely interested in real nativism. Barker was a supporter of Law. At the American Party National Convention which was to follow immediately after the National Council session the fate of the New York aspirants would be decided. The Know-Nothings of New York were therefore anxious for a successful unification of the disorganized American Party as a necessary prelude to a successful presidential campaign.

On February 18, 1856, the National Council came together at Philadelphia.1 At once the old fight over the slavery issue began, for the pro-slavery southerners refused to submit to the excision of the famous "twelfth section" of the platform adopted in June, 1855. On the third day of the debate the vote was called on the motion to strike out, and the result wiped the hated twelfth section from the platform. In this test of policy the New York delegation divided its vote impartially on either side. But now an entirely new platform was demanded to replace the mutilated old one. The Southern men wanted assurances of neutrality from the new party, while the anti-slavery men wanted assurances of hostility to slavery. While debate went on a platform was offered which took compromise ground. It was acceptable to the South but not to the anti-slavery group, which was now in a mood to push its advantage. The Council was at a crisis. If the platform were rejected the Southern men would bolt. The vote on the new platform was such that New York could turn the scale, and now again in 1856, as it had done in 1855, the delegation went with the South to keep the national organization unbroken. The National Council therefore closed its labors

¹ Account is from *Herald* and *Times* reports.

on the 21st, having come back to a stand of neutrality that meant non-interference with slavery.

On February 22nd, the National Convention organized. This body was made necessary by the fact that the National Council had no power to nominate a presidential ticket under the constitution of the secret order. In reality the Convention only continued the work begun by the National Council. membership corresponded to that of the presidential electors of the states. At its first day's session the Convention organized. Among its officers was Erastus Brooks, of New York, as vice-president. Then, as soon as organization was completed and debate opened, the never-ending slavery question filled the air again. By this time, apparently, the more violent anti-slavery men had determined upon a line of conduct. the second day they moved the adoption of a new platform on the ground that a party convention could not be bound by the action of the National Council. The suggestion failed. On the third day the anti-slavery men moved an anti-slavery amendment to the platform, and on a test vote they were defeated 151 to 51. Then they left the convention, a small body of about two dozen. They had sympathizers who deferred a bolt until the party ticket should be selected. On the evening of February 25th, the ballot was taken on nominees. Millard Fillmore was the favorite of the South and was easily nominated. George Law stood next, but far behind Fillmore. The New York delegation on the first formal ballot stood twenty for Law, ten for Fillmore, four for Houston, and one absent. The Convention voted the vice-presidency to Andrew J. Donelson, of Tennessee, and then adjourned. Through the difficulties of the eight-days' struggle the course of the New York delegation had been skillfully taken, and the state organization could now face a presidential campaign for the election of a New York man. Only one or two of the New York delegates had joined that group of anti-slavery bolters who sought to disrupt the re-united party. After this convention it is proper to give the nativist organization the name of "party" in a technical sense, for its nominations made the break distinct between the national organizations of the nativists and those of the Whigs and Democrats. After this convention a voter could hardly be an adherent of the entire nativist ticket, and yet profess any allegiance to the national Democratic or Whig Party. Up to this time a voter might have been both nativist and Democrat, or nativist and Whig.

Within the platform adopted by the National Council was a piece of legislation which needs notice as bearing on the changing constitution of the Know-Nothing system. It has been noted how, after the Philadelphia Council of June, 1855, the various grand councils of different states played havoc with the secret system of the Order. To undo this work was impossible, and it was condoned and legalized instead. Article XV. of the new platform declared:

That each State Council shall have authority to annul their several constitutions so as to abolish the several degrees, and substitute a pledge of honor instead of other obligations, for fellowship and admission into the party.

This legislation did not abolish the secret system either in the National Council or in any state where it had been retained. It merely permitted grand councils to act at their own discretion. The article was in no way mandatory. The Know-Nothing Order in New York state was unaffected and went on as before, a secret society working under the supervision of its Grand Council. As a fitting incident of this period of change into which the Know-Nothing Order was now passing came the retirement of James W. Barker from official leader-ship of the organization in New York. He and his friends were no longer an influence controlling the secret order. When the Grand Council met in annual session in February, 1856, his official term as grand president closed. In the previous December he had declared himself not a candidate for

1 Herald, 1856, February 22, p. 1.

re-election. The Grand Council quietly replaced the old officers with new men.

The personality of James W. Barker dominated the Know-Nothing movement in New York state during its rise to power. The extraordinary expansion of the secret organization was made possible by his administrative genius, and during that expansion he was the great representative of the system which he controlled. Barker was an excellent type of the American citizen, with his interest in public movements, his abiding faith in American nationality and his energy of character. He was broad-minded and conservative at the same time, never a fanatic or an incendiary. As a nativist his sincerity was admitted by even his opponents. The life of Barker was like that of many other business men of the great city.² Born at White Plains, Westchester county, December 5, 1815, he grew up there in the country life until he became old enough to look for better fortune elsewhere. He came to New York city and secured a place as salesman in a dry-goods house, from whence he soon passed into a modest business of his own. He was engaged in the dry-goods trade until he retired in 1851 and opened an office for real-estate work. It was during his extended service in mercantile life that he formed a wide acquaintance and obtained an enviable reputation as a business man. this time, too, that he became interested in church matters and in temperance work. It was probably in the secret orders of temperance that he first reached that acquaintance with the machinery of the lodge-room that served him in such good stead later. The rise of political nativism found him an earn-He belonged to all the prominent societies of the nativist movement. His energy, sincerity and strength of purpose brought him very quickly to the front as a political

¹ Times, 1855, December 14, p. 4.

² For biographical notes see *Herald*, 1869, June 27, p. 7. Also, Smith's *Fillars* of the Temple.

eader of nativism, and this position he never entirely lost, even after he lost personal control of the nativist organization. During the decadence of the American Party, Barker occasionally appeared in connection with the party work and he remained an upholder of the party till its end. In 1859 he left New York city and went to Pittsburgh to re-embark in the drygoods business. Here he built up a successful interest which he kept until his death. In 1867 illness forced him to retire from active business effort for a time, but in 1868 he accepted the presidency of an insurance company in New York and kept in touch with business life. He died suddenly at Rahway, New Jersey, on June 26, 1869. He was, at the time of his death, the head of a small organization which sought to revive the old Know-Nothing system under a new name.

CHAPTER VIII

THE CAMPAIGN OF 1856 IN NEW YORK

THE annual session of the Know-Nothing Grand Council, at which the Barker control was finally thrown off, convened on February 26, 1856, at Canandaigua. In the absence of the grand president, then engaged in president-making at Philadelphia, a temporary chairman called the session to order. The principal work of the first day was the reception of cre-When organization was completed the Council voted a ratification of the new Fillmore and Donelson ticket. On the 27th the Council adopted the new national platform and then passed to debate on a proposal to abandon the secret system in New York. The suggestion was put aside. Next came the annual election of officers. The grand president's place was first voted to Lyman Odell, of Livingston, the unsuccessful nominee for speaker of the Assembly, but Odell declined it, whereupon it was voted to Stephen Sammons of Montgomery, one of the long-tried workers of the secret movement. The place of grand vice-president seems to have gone to George Denniston, of Steuben. For grand secretary. J. Stanley Smith, of Cayuga, was chosen. This election probably closed the work of the session.

The Know-Nothings now faced a new campaign and one which would thoroughly test the strength of the organization. The presidency of the nation and the governorship of the state were the prizes for which the New York branch of the party would work. National and state considerations were therefore mingled in the plans of the year. In the national contest

¹ Account from *Herald* reports.

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the Whig Party was practically defunct and its place would be taken in years to come by either the American or the Republican Party. The campaign of 1856 would do much to decide which of the two was to be the party of the future. In the state campaign the same problem of the permanence of party was to be worked out in a somewhat narrower field. Looking forward to the national contest from the month of February, 1856, the advantage appeared to be on the side of the nativist party; for while the Democracy was divided on the issues of the day and the new Republican movement was not yet organized for effective national work, the Americans were in the field with their issues plainly stated, their national organization re-formed and the anti-slavery element of the party held in check. Looking forward to the state contest from the same standpoint, the outlook was a little less favorable on account of the energy and aggressiveness of the Seward coalition in New York. Political leaders realized by this time that the slavery issue was all-pervasive. It was thrusting itself forward in every political organization of the day and was the great disturbing factor in all calculations. was to the popular interest in this issue that the Republican leaders addressed themselves and their political future would depend upon the strength of the popular response to their efforts. The proper course of the Know-Nothings, who had nothing to gain and much to lose by anti-slavery feeling, was to minimize the Republican influence and keep the ideas of nativism in the popular mind until the force of anti-Southern feeling could spend itself. The actual fact that the Know-Nothing Order was losing ground in New York state was not plainly apparent in the spring of 1856. The exodus from its secret councils was not yet great enough to attract attention, and although the flimsy veil of mystery was rent, yet the secret machinery of the Order ground on unchecked and uncomplaining. Unlike other states, New York had remained faithful to its secret system in politics, and in the local spring

elections of 1856 it won victories on all sides. This in itself was an evidence of real strength.

The latent weakness of the Know-Nothing organization was the existence of a strong anti-slavery feeling among its own membership. This feeling was a constant source of danger, and in the campaign of the year it was roused to action as a result of the ambitions of George Law, the rich contractor. The presidential aspirations of Law were promoted by a shrewd newspaper man named Scoville, who, after the failure of the Law canvass in the regular national convention, placed himself in touch with the dissatisfied minority and planned anew for a nomination for his patron.* The New York organization had practically held aloof from the bolt made by the anti-slavery element in the Philadelphia Convention of February, 1856, and its adhesion to the Fillmore ticket was undisturbed until the supporters of Law began their work. Without the efforts of Scoville there would certainly have been individual repudiations of the Fillmore ticket, like that of Col. Seymour, the Know-Nothing state engineer, but the scheme of the Law clique was to organize the anti-slavery element of the Order behind a new presidential ticket. The signs of this movement appeared in It soon found ample support, because the Fillmore nomination was really distasteful to those persons who sympathized closely with the anti-Southern idea. As president Fillmore had signed the Fugitive Slave Act and as candidate in 1856 he was believed to be a Southern hope. Law was not especially desired as a candidate. In fact he probably never had the remotest chance of a presidential nomination. He was a convenient figure-head and possibly a source of supplies for the mischief-makers of the Order. The faction that used Law's name were properly styled at the time "Anti-

¹ Herald, 1856, November 25, p. 4. This story of Law's canvass bears plain marks of editorial spite, but it seems reliable.

⁸ Herald, 1856, March 22, p. 8.

Fillmore men." Sometimes also they were called North Americans and their opponents South Americans, to indicate their supposed sectional sympathies. On April 10th the Anti-Fillmore men were gratified by a call for a new American national convention, issued by the bolters of the Philadelphia Convention. This was their opportunity. In various portions of the state the anti-slavery element now gathered itself together at a hint from the leaders and chose delegates to a state convention of May 20th. It does not appear that this distinctly schismatic movement was opposed by the new grand officers of the secret order. The Anti-Fillmore men went on unhindered. Their convention at Albany on May 29th organized itself under the presidency of D. N. Wright, of Westchester. An anti-slavery platform was adopted, a state committee created and a delegation of thirty-five members named to represent the state in the schismatic national convention called to meet at New York city on June 12th. This state convention was the formal organization of the Anti-Fillmore element as a separate political group in the state. Its members were not, however, seceders from the Know-Nothing Order. Their convention did not purport to be a grand council or to legislate for the secret order. The proposal of one of its members to organize a rival grand council met such expression of dissent that it was withdrawn. The convention was only a medium through which to formulate the views of the antislavery Know-Nothings.

The New York Know-Nothings were falling into organized factions when the regular annual session of the National Council came in June. The proceedings of that meeting did not, however, add any features to the political situation. It was a business session largely.³ The Council met at New York

¹ Text of call in Herald, 1856, May 1, p. 4.

Account from Herald and Times.

Account from Herald.

city on June 3d, and after organization passed into debate upon the merits of secrecy. It finally decided to abolish the secrecy of its own sessions. Then it formally ratified the Fillmore and Donelson ticket, and passed on to the election of new officers for the following year. On the third day of the session the Council appointed a national executive committee and an advisory committee, and adjourned. In the election of national officers, E. B. Bartlett, of Kentucky, was re-elected to be National President. Erastus Brooks, of New York, was made National Vice-President. The election of the latter was a compliment to his prominence in the New York organization. After the overthrow of the Barker clique, Brooks had come to the front as leader of the conservative nativist element in the Know-Nothing movement. His interest in the New York Express, which was now the leading mouthpiece of the American Party, and his reputation as champion of nativism, made him looked to as a proper representative of the movement. For the next few years Brooks was the acknowledged head of the state party. The act of the National Council in abolishing its own secrecy needs notice also. In the preceding February the Council had legalized the disuse of secrecy by the grand councils. In the present event it legalized its own disuse of it. At the same time it did not attempt to interfere with the state councils in the matter, and no state was affected by the new law. Its text was as follows:

Resolved, That we present the American Party to the country, not as an Order, not as a Society, but as a broad, comprehensive, conservative national party, standing, like other political parties, openly before the country, inviting to its fellowship all who adopt its sentiments and participate in its convictions. But nothing herein shall be construed as to interfere with any organs which the party in any state, for its government, may have adopted or choose to adopt.

In the politics of New York state the chief event of June was not the National Council, but rather the Anti-Fillmore national convention of June 12th at New York city.* It was

¹ Herald, 1856, June 5, p. 1.

² Account from Herald.

for this gathering that the anti-slavery element had prepared itself, and before which the adherents of George Law would urge, with more or less sincerity, his nomination to the presidency. The convention would represent a rift in the unity of the great nativist party, and might bring about a disruption of the national organization. On this latter account it was watched by the whole country. The convention organized on June 12th with a full New York delegation, from which the convention chose Jerome B. Bailey to be a vice-president and Robert Frazier to be a secretary of the session. On the second day an appeal was made to the police for protection against the mob of Fillmore men who gathered about the convention hall to show their resentment. This was the day on which a friendly letter from the Republican national committee was read before the delegates, revealing a relation between the Anti-Fillmore movement and the Republican. On the third day, when the convention proceeded to the nomination of a presidential ticket, it became clear that the convention managers were planning to annex the Anti-Fillmore movement to the Republican Party, for Law was set aside entirely, and the contest lay between N. P. Banks and J. C. Fremont, both typical Republicans. Most of the New York delegates supported Banks. On the fourth day the New Jersey men led a bolt in protest against the Republican aspect of the convention. small group of delegates left the hall, but the regular work of the convention went on until the ticket was completed. Banks and Johnston were the nominees. The convention then adjourned for a few days with the hope that its ticket would be endorsed by the Republican national convention at Philadelphia. That hope failed, and the convention re-assembled on the 20th to substitute Fremont for Banks on the Anti-Fillmore ticket. The events of June 16th closed Fillmore's path to the White House. They destroyed even the nominal unity of the American Party, and declared that Fillmore must not receive the support of anti-slavery voters. The power of the national nativist party broke at this point. In the state of New York the anti slavery element of the secret order was committed to the new nominees by its share in the Anti-Fillmore convention, but some of its members turned back from the Fremont ticket. One or two of the delegates of the convention re-pledged themselves to Fillmore. One or two others joined in nominating the short-lived Stockton and Raynor ticket. Nevertheless the action of the New York convention had the effect of facing many Know-Nothings toward the Republican Party in New York state. The cleavage line in the secret order showed distinctly after this between Fillmore Know-Nothings and Fremont Know-Nothings. George Law was expelled from the Order by vote of the council to which he belonged. It was the penalty for his ambition.

The anti-slavery issue moved steadily to the front during the summer of 1856. As the existing organizations of party had broken down before nativism in previous years, so now they broke again at the impact of organized anti-slavery. The phenomenon of the anti-slavery revolt in the Know-Nothing organization was duplicated by a similar movement in the Democracy. In July a state convention of Radical Democrats met at Syracuse, and while earnestly insisting on their own Democracy, endorsed the Republican national ticket.8 The Fremont ticket by the end of July was assured of support from professed Know-Nothings and from professed Democrats. Republicanism was now strong in New York state. The nativists could no longer feel confident of success in November, in view of these additions to the Republican forces. Political lines were being re-drawn, with slavery as the test of position, and the secret movement was losing by the changes. The campaign accordingly became a desperate

¹ Nominated by bolters from the Anti-Fillmore convention.

² Times, 1856, July 14, p. 4.

³ Herald, 1856, July 25, p. 1.

struggle in which nativism tried to retard and Republicanism tried to encourage the current which was setting toward the newer movement. This accounts for the form which the campaign arguments took in New York state. Instead of discussing the issues of the day upon their merits, the political press conducted a series of assaults upon the respective party nominees. The Know-Nothing papers ceaselessly rang the changes upon the charge that Fremont was a Roman Catholic in his religious relations, and if elected, would aid papal influence. This story was used to deter nativists from leaving the fold. The Republican papers, on their side, urged that Fillmore was not a real Know-Nothing, having never attended a council session in his life, that he had been nominated by convention intrigue rather than by popular voice, and that he was forced upon the Order by pro-slavery men. These arguments were intended to justify secessions from the Fillmore organization.

Notwithstanding the divisions that had grown up among the Know-Nothings of New York, the Order was still a single society governed by a single Grand Council. But the restiveness of the anti-slavery element under the official leadership of Fillmore men indicated danger. The official endorsement of Fillmore by the February Grand Council could hardly go unattacked. It became evident that a clash of factional strife would diversify the August session of the grand body. councils chose delegates to this Council who were known to be opposed to the Fillmore ticket. On August 26th, when the Council came together at Syracuse, the grand-president met the problem by taking measures to avert trouble.1 He secured the admission of Fillmore delegates to the Council. but upon some pretext rejected the credentials of those delegates who were known to be against Fillmore. In this way he secured unanimity in the council-hall, but at the same time he created an angry minority on the outside. It was this outside group which organized as a state convention on the 27th

1 Council account from Times reports.

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The next act in this drama of successive conventions was the session of the North Americans on September 17th, as called by the anti-slavery element which Grand President Sammons had forced out of the August Grand Council. The attempt of the seceders to organize a split in the Order seems to have been a failure: at least the Republican press does not exult over any

nominees of the Order.

effects of it. The seceders had grandly declared their convention to be the real head of the American organization, but it was a head without a body. A delegate elected by a Know-Nothing council had no power to violate the constitution of the state society nor to bind his own council to an unlawful Although the seceders of August had the sympathy of a certain dissatisfied element, it does not appear that they were supported in their extreme acts. Their convention met, nevertheless, at Syracuse on September 17th, while the Republican state convention was in session there. It organized with William W. Campbell, of Otsego, as presiding officer. Col. Silas Seymour, the Know-Nothing state engineer, then offered a resolution that the convention accept and support the Republican state ticket. This brought violent debate in which the fact developed that not all the convention were ready to be merged into Republicanism, despite their leanings that way. The majority ruled, however. Seymour's motion was carried. Then came that almost inevitable feature of political conventions in this memorable year of 1856. The minority bolted and called a new convention. The gyrations of "the popular will" at this period are not without a certain amusing side in their revelations of wavering and uncertainty among men. At the same time the long list of conventions, counter-conventions, bolts and secessions shows interestingly how swiftly changing was the political structure and how the members of it were rearranging themselves in obedience to new forces. It was a confusion out of which a new order of things was to come. The whole story of the conventions of 1856, so far as it concerns political nativism, may be condensed in two statements. First, the slavery issue entered the national organization of the Know-Nothing Order and destroyed its unity. Second, the slavery issue entered the New York state organization of the Order and weakened it without destroying its unity. In every convention the fact was shown that the anti-Southern movement was gaining at the expense of nativism.

¹ Convention account from Herald.



On September 23d came the final convention of the list. The regular American state convention met at Rochester, and at the same time there also met the convention called by the bolters of September 17th. Thanks to the events of the August Grand Council the anti-slavery element was practically absent from both bodies. The repentant bolters from the Syracuse gathering made overtures to the regular body and were welcomed back on their tacit confession of error. Under the presidency of F. W. Walker, of Queens, the 121 delegates of the erring minority held their session open until the regular state ticket was chosen. Then they voted to support it and went home. The regular state convention had several hundred delegates present. It organized under the presidency of James W. Barker and passed to the nomination of a state ticket for the fall election. For the governorship the delegates were of one mind and the choice was made by viva voce vote. On other offices ballots were taken. The completed ticket was as follows:

Governor Erastus Brooks, of New York.

Lieut.-Governor Lyman Odell, of Livingston.

Canal Commissioner Amos H. Prescott, of Herkimer

Prison Inspector James P. Sanders, of Westchester.

Clerk, Court of Appeals Alexander Mann, of Monroe.

All of these were men who had become known for their work in aid of the Know-Nothing cause. Brooks was editor of the leading Know-Nothing newspaper of the state, and had for a year been looked upon as the logical nominee of his party for the governorship. Odell was the nominee of the nativist legislators in the recent speakership contest at Albany. Sanders was the unsuccessful candidate in 1854 for the same office to which he was now nominated. Prescott and Mann were local leaders. Prescott had served in the legislature and was on the state committee of his party. The nominees were

1 Tribune, 1855, November 7, p. 4.

all good representative men. Besides the state ticket, the convention also formed an electoral ticket to represent the Fillmore and Donelson forces. The members follow:

Daniel Ullman. Jesse C. Dann, William H. Vanderbilt. Roswell Graves, Joseph H. Toone, Benedict Lewis, Jr., Gilbert C. Deane, Henry Grinnell, Alexander M. C. Smith, Richard S. Gray. Abram Hatfield, Andrew Conger, Rufus W. Watson. Charles Whiting, Orsamus Eaton, Leonard G. Ten Eyck, Daniel A. Bullard, Henry N. Brush.

Silvester Gilbert. Charles B. Freeman, William Greenman, Theodore S. Faxton, Alexander McDowell, Samuel J. Holly, Henry H. Babcock. B. Davis Noxon, John Knowles, Jr., Barzillai Slosson, Lewis H. Culver. Truman Warner, Ionathan Child. Abel Webster, John T. Bush, Nelson Randall, James G. Johnson.

After the Rochester convention the state campaign began. The national campaign was already in full swing at this time, and up to election day it completely overshadowed the state contest. There was no new issue in the state administration to be decided and nothing important to draw away attention from the great national issue of the relations between the North and South. The latter was the real point of the whole struggle. The work of the anti-Southern leaders had been successful in forcing their issue to the front and practically excluding nativism from the popular interest. Nativism might yet, perhaps, be a potent issue in some of the country districts where the Know-Nothing organization was a recent invader, but in the older regions of nativist work the doctrines of the movement had lost their hold to a great extent. Thousands of the voters who supported nativism in 1855 were turned into the Republican column. Many of the newspapers

which had fought against the Seward coalition in the former campaign now joined the current of the hour and worked for the Fremont ticket or else for the Democracy. The Whig Party was gone, leaving a remembrance of itself in the group of Old-line Whigs, whose state convention of August 14th endorsed Fillmore.1 But this remnant of the Whig Party was only a shadow. The Republican organization was making good its claim to the place that the Americans had sought to reach, that of permanent antagonist to the Democracy in place of the old Whig Party. The movement was showing itself to be a real party. Fillmore's candidacy had been hopeful of success before the anti-Fillmore convention of June. After that event the futility of his prospects became manifest as the campaign went on. The presidential question settled down to the choice between Fremont and Buchanan. The nativist vote was appealed to for help by both Republicans and Democrats, each side trying to profit by the nativist antipathy for its rival. While Democrats worked upon the nativist hatred of Seward and sectionalism, the Republican press worked upon the nativist dislike of the Democracy. There seems to have been some slight effect of these efforts, for the nativist presidential ticket ran 5,000 votes lower than the state ticket. The averages on state tickets were as follows:

King-Selden ticket:									
Republican Party. Radical Democrats Anti-Fillmore men.)
Radical Democrats		•							266,300 votes.
Anti-Fillmore men.)
Parker-Vanderbilt ticke									
Democratic Party.									. 197,200 votes.
Brooks Odell ticket:									
Nativist party	•		•			•		•	120.700 votes
Whig Party									,,,, volum

¹ Times, 1856, August 15, p. 1.

² From official canvass broadside. Liberty Party omitted, having cast about 160 votes in the state.

This election showed conclusively that the nativist political movement was on the wane. In 1855 it had been strong enough to cast 34 per cent. of the total vote of the state, while now it cast only 22 per cent. Such a loss was appalling to those who had hoped for the future success of the American organization. It showed that organized nativism could not withstand the steady pressure of the slavery issue. It showed that the backing of popular favor was being withdrawn from under the fabric of the Know-Nothing Order. The loss to the nativist party in New York was not in any one section, but was distributed all over the state. In a few counties there was a slight increase of the nativist vote over that of 1855, but it was not significant. The election was a Republican victory. On the state ticket the Know-Nothings were weaker than either of their rivals. They elected only eight assemblymen to the legislature and only two members of Congress. In the coming year the nativist organization would have no influence whatever either in state administration or in public legislation. They had failed to harvest any results from the power won by them in the campaign of 1855. The state canvass showed the following poll and percentages for governor in the counties of the state:

	Per cent, Vote.		Per cent. Vote.
Albany	. 31 5,655	Essex	20 1,011
Alleghany	. 11 987	Franklin	30 . . 1,260
Broome		Fulton-Hamilton	21 1,178
Cattaraugus	. 14 1,064	Genesee ,	20 1,216
Cayuga	. 19 2,091	Greene	26 1,555
Chautauqua	. 19 2,142	Herkimer	17 1,355
Chemung	. 15 796	Jefferson	9 1,090
Chenango	. 13 . 1,205	Kings	29 8,777
Clinton	. 23 1,388	Lewis	11 495
Columbia	. 23 2,005	Livingston	29 2,132
Cortland	. 12. 658	Madison	11 958
Delaware	. 23 1,981	Monroe	21 3,197
Dutchess	18 2,023	Montgomery	28 1,744
Erie	. 28 5,552	New York	28 . 21,423

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Niagara	26 2,025	Schoharie		25 1,700
Oneida	9 1,746	Schuyler		16 641
Onondaga	12 1,994	Seneca		26 1,311
Ontario	27 2,283	Steuben		17 2,116
Orange	21 2,209	Suffolk		31 1,951
Orleans	27 1,502	Sullivan		39 2,068
Oswego	11 1,391	Tioga		8 464
Otsego	12 1,310	Tompkins		21 1,470
Putnam	19 477	Ulster		40 4,739
Queens	34 2,304	Warren		21 818
Rensselaer	35 · · 4,913	Washington		24 2,059
Richmond	29 957	Wayne		17 1,568
Rockland	30 937	Westchester		29 3,750
St. Lawrence	11 1,422	Wyoming		10. 642
Saratoga	28 2,685	Yates		9389
Schenectady	34 . 1.258			

The lesson of the canvass of 1856 was easily read by the leaders of political nativism. It told them that their movement was dying as a national party and as a state organization. It told them emphatically that the new Republican Party was in the ascendant, and that Know-Nothing voters were deserting nativism to join the new favorite. Their fight to restrain the exodus from the secret councils had been only partially successful. If political nativism in New York hoped to hold itself in place as a factor in state politics it must find some new source of strength, either in principles or organization. Some voices were raised to ask the abolition of the secret system, while others asked a new platform, and still others advised a return to the old method of endorsing nominees of other parties. The work of change, if any there was to be, would fall upon the Grand Council of February, 1857.

The Grand Council met at Troy on February 24th and after organization turned first to the election of officers for the ensuing year. Friends of James W. Barker proposed to put him again at the head of the secret order, but the Council chose Jesse C. Dann, of Erie, as president. For vice-president the choice of Henry B. Northrup, of Washington,

and for secretary that of C. D. Brigham, of Albany, were made. That element which desired to reform the Order and improve its political prospects by an alteration or destruction of the secret system soon found voice in the Council proceedings. At the second day's session a delegate from Brooklyn opened an attack on the secret system, but the debate which began was interrupted by the report of the committee on platform which had been laboring to satisfy the demands for improvement in the American Party principles. Ever since the adoption of the "Binghamton platform" in August, 1855, that document had been the formula of American principles in New York. But now nativism needed to declare itself again as to its position on the slavery issue. The committee accordingly brought in a new platform which re-stated the old neutral position of the Order as to slavery and closed with a savage criticism of the Republican leaders who represented that issue. The Grand Council voted to adopt the platform as reported. Then the debate swung back again to the subject of the secret ritual. Delegate Parsons, of Albany, offered a resolution abolishing all oaths, obligations and degrees in the party. This resolution seems to have passed, but not for immediate effect. Instead, a committee of five headed by Parsons was given the duty of reporting a revised and simplified ritual to the next Grand Council. With this action the Council left the subject. Next came the election of two delegates to the National Council. Then after a resolution denouncing Senator Seward for certain compliments to the foreign element, the body adjourned. The demand for changes in the Know-Nothing system had been juggled at this session instead of approved. The Grand Council made no change whatever in the secret system. By seeming acquiescence in the demands for changes, these demands had really been put off to another day, while the secret system remained as before. The new platform of the party was as follows:

Resolved, That we emphatically affirm the Binghamton Platform, consisting of eight sections.

[Here follow those sections in full.]

Resolved, That while the American Party in the State of New York tolerates free discussion and free expression of individual opinions on the various political questions of the day, yet under every political complication the pure question of Americanism shall take precedence of all others.

Resolved, That we are now, as we ever have been, unalterably opposed to the extension of slavery into territory from which, by the Missouri Compromise, it had been excluded forever.

Resolved, That we are opposed to the use of the power of the general government to extend the institution of slavery, and are willing that the natural laws which govern emigration shall decide that great question without the least interference of federal authority.

Resolved, That the recent exposure of corruption at Washington, the gross venality of political leaders and the present effort of the State Senate to strip the American Canal Board of its power, are in direct violation of the spirit of the Constitution and reveal the objects and character of those who profess to be apostles of humanity and freedom, and should open the ears of every honest man to his true position while aiding to elevate them to places of trust and power.

The National Council for which the New York Grand Council elected delegates met at Louisville in June, 1857.1 Among its members were Erastus Brooks as National Vice-President, with James W. Barker and Stephen B. Cushing as regular delegates from New York. The defeat of Fillmore had ended the political usefulness of the National Council, and since its value as an administrative head of a secret society was gone long before, the members now decided to close it forever. The national officers were elected for another year and a national committee was provided for with power to reconvene the Council if there seemed need of it in the near future. On June 3d the National Council adjourned sine die and with this act ended finally the national organization of the Know-Nothings, after a meteoric career of only three years. The Council never met again. In July, 1857, the National President appointed a national committee of thirteen members as the Council had provided. New York was represented in it by

¹ Herald and Times reports.

² Herald, 1857, July 19, p. 4.

Erastus Brooks and James W. Barker, but it is not on record that the committee ever took any official action.

The final disbandment of the National Council was fresh in the minds of the New York Know-Nothings when the Grand Council met again for its semi-annual session in August at Brooklyn. There seem to be no available statistics as to the strength of the secret order at this time. In the earlier life of the Order the grand-president was accustomed to report the increase of membership from time to time, but during its decadence there was a reticence as to such facts that can be easily understood. The regular August session of 1857 began on the 25th. After organization the president delivered the annual address. Among other suggestions he advised that the whole system of council organization be dissolved, and that the Order become in form as well as in name a political party, governed only by committees and conventions. At the conclusion of his address the proposal came before the Council for consideration. The debate soon showed two ideas of Some desired with the grand-president to abolish the council system and with it the secret ritual, while others. wished to keep the council system, but without the secret ritual. A delegate from Onondaga finally brought about a vote on the question of organization, and the council system was saved. This left the fate of the ritual yet undecided. The Parsons committee now reported on the simplified ritual which the preceding Council had empowered it to make. Since the February session the committee had formulated, printed and distributed to subordinate councils a new ritual. This new form was not wholly satisfactory and failed of adoption, and at the close of discussion the secret procedure of the Order was wholly abolished by formal vote. An order was also passed that in future the Grand Council should meet only once a year, in each successive August. Following is the text of the resolution that ended the secret system:

1 Herald, 1857, August 26, p. I.

Resolved, That the oaths, obligations and degrees of this Order be dispensed with, and that hereafter members be admitted by signing the platform and resolutions passed by the State Council, and assenting to the following pledge: You do hereby promise upon the honor of an American to be true and faithful to the principles of the American Party.

This abolition of degrees and oaths took away all the ties of pledged brotherhood that had made the Know-Nothing Order a real fraternity of American citizens. The members of the American organization would not in future have any special duties toward their fellow-members, and since the existence of such duties is the essential feature of a brotherhood, the American organization would be henceforth only a non-secret society of the simplest type. After August 25, 1857, it is no longer proper to refer to the Know-Nothing Order as existent in New York. At the same time the vague term "Know-Nothing" as a synonym for "nativist" was very commonly used so long as any American organization existed. The abolition of the secret ritual received very little notice at the time it occurred, because its mystery had long since been stripped away by hostile critics. Nevertheless, the formal change made by the Council was an important landmark in the story of political nativism.

The peculiar system of secret political work which thus found its ending after seven years of energetic activity stands out in the history of the nation as an abnormal feature of American politics. It has been, during its life and since its death, subjected to bitter criticism, reproach and ridicule. Yet it is not to be dismissed with a gibe and a fling merely because it has passed away. The same influences that created it then still exist to-day. Within recent years the politics o New York state, and possibly also those of the nation, have felt the effects of a similar secret system. The influence of secret societies in American politics has, in fact, been almost continuous, though none other ever reached the gigantic growth attained by the great Know-Nothing society. The

latter stands out in such bold relief in the nation's history on account of the national character of its effort. Usually the secret organizations of the American people have been local in their efforts.

The end of the Know-Nothing secrecy in New York state is an appropriate point at which to review the nature of this system, whose success was so brilliant and so brief. It is well, by way of preface, to note that there was no necessary connection between the secret system in politics and the principles of nativism. Organized secrecy has been used to forward other than nativist doctrines, and nativist principles have been often promoted without the aid of secrecy.

What was the origin of the secret system? It was an effort to offset clannishness of one sort with a clannishness of another kind. There existed in the American community a minority group of persons who differed in race, thought, life and religion from the mass of their fellow-citizens, and who yet gained distinct advantages for themselves by acting together. The American-born population as a whole was not by nature clannish nor jealous of the foreign-born minority, but in a considerable portion of the natives both these feelings existed. The jealous element sought a medium of expression. Already there existed in the community a form of association called the secret society, which was essentially an artificial clan, founded on an artificial sense of brotherhood. The secret society system naturally offered itself and was accepted as an offset to the racial group. There was no proscriptive feature of the Know-Nothing clan which was not duplicated by the racial group to which it was opposed. The difference was that in the one case it was a matter of written rule, while in the other it was a matter of instinct.

Why did the system expand? In New York city it expanded because it furnished an easy remedy for the more objectionable forms of race-clannishness. In economic effort natives were at liberty to traffic with the foreign people or not as they



pleased, and could easily avoid contact when desirable. social effort the native-born were equally free to seek or avoid social intercourse with the foreign element as preference might dictate. But in political effort the contact was unavoidable. If aliens were insolent in office and bullies at the polls, if they packed party primaries and made conventions farcical, the remedy was less easy to find. Some nativists believed in the remedv of meeting force with force, and from this plan, when carried out, came the riots of the great cities. More conservative men preferred a peaceable way of checking evils, and saw the means in the use of secret politics. Had the anti-foreign movement been an open one, it probably could never have attained strength; for every member would have been a marked man, denounced by his party, attacked at the polls and injured in his business. In the secret system the minority could act without exposing individuals. These facts explain local expansion, but they apply less to the state at large. 1854, by a sudden leap, the secret system spread far beyond the bounds of local effort. It took a gigantic stride toward power as a state and national organization. This expansion requires a different explanation. The whole nativist movement in state and national affairs was a politicians' movement rather than a popular one. The leaders in politics welcomed the issue of nativism as an escape from the chaos that was growing in party conditions. They accepted with it the secret system because the two had necessarily at first to be taken together. The hold of the secret system on state and national politics was nevertheless insecure. In most cases the secret system was shaken off as soon as circumstances would There is a double answer, then, to the question why the Know-Nothing Order spread. In the politics of the great cities the secret system expanded because it furnished a convenient medium for desired reform. In the politics of the nation and the states it expanded with the growing issues which it represented because at first it could not be separated from them.

Was the secret system a public danger? The Know-Nothing Order was a well-hated institution while it lived. Unsparing criticisms were launched against it by those whose plans it frustrated. Yet, in general, the critics were not specific in their charges. The personal respectability of the Order in New York state was unquestioned. was never charged against the secret system that it was a refuge for the disorderly, the disreputable or the corrupt. In fact, the peculiar machinery of the Know-Nothing Order could hardly have been worked successfully except by intelligent, well-meaning and law-abiding men. The use of the ritual and the maintenance of discipline were conditioned upon these qualities. It is doubtful whether a society of this sort could ever have been a public danger by reason of its personnel. Commonly the attacks on the Know-Nothing Order were directed against its secrecy of action. Occasionally the secrecy of membership was touched upon, but little stress was laid on this latter feature, since it was largely a matter of individual taste whether or not a person should avow his connection. As to secrecy of action, the critics declared in general phrases that it was dangerous to the common weal for large bodies of men to act in secret on political matters. At the same time this dictum was not supported by specific references to abuses arising from secret action. complaint originated chiefly among those politicians whose schemes were upset by Know-Nothing secrecy, and who appealed in self-defence to the jealousy of American voters. The apologists of secrecy answered pertinently that political party committees were secret in action and no one expected them to be otherwise; that a Know-Nothing council was a political committee sworn to uphold American institutions, and that it used secrecy for a certain good and unconcealed reason. This reason, they explained, was the necessity of fighting the secret machinations of the Roman church with like subtlety. Inadequate to the real facts as this reason was, it passed as an

excuse. Logical attacks on secrecy were made difficult, also, from the obvious fact that secrecy was seemingly justified when it secured a plurality of votes. Viewed from the standpoint of later years, it can be seen that the real danger of sustained secrecy in politics lies partly in the fact that issues and men may be withheld by it from the public scrutiny, and be put in power without due debate, and partly, also, in the fact that organized secrecy gives undue influence to minorities. Yet even these objections hardly hold against an organization in state politics, for a sustained secrecy of men and measures in a political contest extending over a wide area is practically impossible. They hold good as to local politics. It is right that any issue which seeks recognition should let its character and support be known, so that the opposition may array itself for a fair fight. The system of political secrecy, then, would seem to be a real public danger, though practically limited by the inability to sustain secrecy with a popular large support.

Did the secret system enslave the voter? It is a favorite charge against secret societies of all sorts that they take away the free-will of their members. The Know-Nothing Order was criticised on this ground, and its oaths and higher degrees were cited as evidence. The general charge of limiting the free-will of individuals is one to which nearly every organization, secret or non-secret, must plead guilty. Else there were little virtue in organization. In its general form, therefore, the charge is misleading when used as a reproach. When the attack upon societies is made upon the specific point of using oaths, then it can be considered more closely. practice, all secret societies are voluntary societies whose members may withdraw and lay aside both the active duties imposed upon them by the terms of their membership, and the advantages connected with that membership. Secret society oaths seldom refer to this right of withdrawal, but are usually phrased upon the tacit assumption that no withdrawal will occur. Wherever an oath of association attempts, therefore,

to regulate the action of members while outside of active membership, it is contradictory to practice. The Know-Nothing oath of the first degree was not so phrased as to be perpetually binding. This was the oath taken by the ordinary voter who came into the society. He was in no way bound, therefore, to limit his own free-will, except so long as he might choose to do so by keeping his membership. With regard to those Know-Nothings who progressed to the second or third degrees, the case was somewhat different. Here the member bound himself to keep the oath "through life." By theory, the taker of these degrees lost his free-will for the rest of his life, whereas, by practice, he threw off his limitations by simple withdrawal from the organization. The charge against the higher degrees was that they gathered to themselves the real control of the society, and left the general membership only the power to follow the self-elected leaders. The actual fact in the Know-Nothing Order was that the first-degree men were the ones who decided all definite political action. The higher-degree men had no power to coerce the general membership in any way, and among all the complaints that were voiced against the Know-Nothing system in New York at various times by dissatisfied members of the Order, there is nowhere an allegation that the higher degrees were possessed of undue power. There was one slight element of truth in the charge against the higher-degree men. It was this, that in the Know-Nothing Order, as in all societies, there were cliques of leaders, and that these cliques usually held the upper degrees. This condition of affairs was precisely what the Know-Nothing system desired. It was intended that the real leaders of the Order should be tagged and labeled, so to speak, that they might be recognized and treated as such.

What were the results of the secret system? Since the machinery of political effort was only a medium, it was to be expected that the results produced would follow very closely the character of the group who used the machinery. The

leaders of the Know-Nothing society during its rise to power were earnest and sincere. Their machinery gave the well-intentioned voter more power than he received from the great political parties. The secret Order brought new men to the front and did something in the way of purifying politics. It made its mistakes, as was natural, but on the whole its influence upon politics was good. At the height of its power it fell more into the hands of professional politicians, some of them being men of its own creation. It was then that intrigue and unfairness destroyed the virtues of the secret system. Yet, from first to last, with all its errors and weaknesses, the record made by the secret system in New York state was not unfavorable to it. It did not encourage lawlessness, corrupt the franchise or stifle public opinion, and all these offenses were chargeable against the open political organizations of the day.

Can a secret movement be successful? There seems to be nothing to prevent a repetition in American politics of the phenomena of a secret political movement. Under favoring conditions some well-organized society might meet as startling a growth and sudden success as did the secret order of the Know-Nothings. There are several conditions, however, which make it very doubtful whether such a system could be other than transitory. The preservation of strict secrecy by a large organization is difficult if its enemies are active. would be practically impossible for any political society to keep its character or aims secret for more than one campaign. The most that it could do would be to keep secret its methods of work. More important for its success than aught else would be its ability to hold the confidence of the public. It is safe to say that no secret movement in the political field could avoid the chill of jealous suspicion from the moment that it made its demand for recognition. By patriotic professions that suspicion might be held in check, but it would be a burden which would have to be borne. The inevitable tendency of such movement would be, as it was in the Know-Nothing

Order, ultimately to sacrifice the element of secrecy in some moment of need, in order to appease criticism and gain support. This has been the experience of the secret societies which have endeavored to organize voters. The instinct of the American people may be said to be in the main opposed to secret organization for political effort. In the constant warfare of politics every voter is a combatant, and no man likes an opponent whose strength or whose motives he cannot gauge.

CHAPTER IX

LOCAL NATIVISM IN NEW YORK CITY, 1854-1860

The local history of the nativist movement in New York city possesses a special interest not attached to its existence in any other part of the state. It was here that it had its origin and its greatest real strength. Probably there was no other place in the state where the movement was so largely based upon actual antipathy for the foreign element which it desired to limit. In New York city, too, lay the strength of the earlier governing cliques of the Know-Nothings and kindred orders. Their personal influence in the secret associations to which they belonged kept them in their place. In the local columns of the New York press can be read more clearly than anywhere else, the evolution of the secret movement and the causes of its decay.

The story of nativism as a local force in New York city may be taken up again in the summer of 1854, when it was differentiated from the wider interests of the secret order by the entry of the latter into the field of state politics under the direction of President Barker. The managers of nativism at this time were not the less attentive to New York city on account of having the whole state to engage their attention. On the contrary, their personal interest lay more in city politics than in state affairs. The situation in the local politics of New York city at the opening of the campaign of 1854 was very similar to that in the state at large. There were two old parties broken up into factional groups, and three organized movements, striving to gain recognition for their respective issues. Anti-slavery had no organization devoted to it in

local politics. The three local issues were nativism, temperance and municipal reform. Each one of these was organized and insistent. Of this trio, nativism was undoubtedly the strongest when the campaign began. The nativist secret societies in the city were now in their time of growth. members were enthusiastic and sincere. Bound to the doctrine of political action by the strong tie of an oath, the organized nativists were an important element within the lines of every other political organization. They dominated the Whig and temperance organizations. They were strong in the Hard-Shell Democracy and in the city-reform movement. Even in the Soft-Shell Democracy, with its predilection for the foreign vote, the nativist influence made itself heeded by the party managers. Not merely in numbers, but in organization as well was nativism strong. In July, 1854, the Know-Nothing managers created the machinery of the city committee with its descending hierarchy of executive workers. Over each ward was a council-president, over each election district was a superintendent, and over each ten voters was an assistant pledged to muster his men at the polls. This system was calculated to poll every vote that was at the service of the Order. In this effort the Order was supported by the O. U. A., whose leaders desired their executive system to work in harmony with that of the Know-Nothings. The Executive Convention of the O. U. A. on August 14th also parceled out the executive members into ward groups for more effective action than before.

Under the inspiration of expected success a new step in the evolution of secret politics developed. Hitherto it had been the idea of both the secret orders to await quietly the action of the older parties in local politics, and then, after the party action had made tickets, to endorse or condemn the various nominees. The original plan of organized nativism was to act

¹ Herald, 1854, October 30, p. 1.

³ Executive records of O. U. A.

as a monitor of the old parties by using the balance of power. Now, finding themselves possessed of unaccustomed strength. the leaders of nativism took up a new plan. They contemplated taking the initiative themselves. They would make their nominations in the secret societies, and then use the machinery of the older parties to bring these nominations before the world. By the close of August the daily press had learned that Barker and other leaders of the Know-Nothings were working to secure secret nominations, which were to be ratified by the Whig city convention, packed with Know-Nothings for that special purpose. Barker desired the mayoralty. The nativist vote was in August estimated at 8,000 to 10,000,2 sufficient under the circumstances to elect whichever party nominee it might choose to endorse.3 If, therefore, a Know-Nothing nominee could be foisted upon any of the evenly-balanced party groups, he was certain of election. The matter was complicated, too, with state politics, for there was a scheme on foot by which the nativists and Silver-Gray Whigs were to capture the Whig state convention, and to that end the nativists in New York city must control the Whig primaries. To meet this danger of nativist domination the older party managers bestirred themselves. At the Democratic primaries, which came first, the Know-Nothing influence was noticeable, but not threatening. At the Whig primaries of September 12th the Know-Nothings, aided by the O. U. A., triumphantly selected delegates to their liking. So confident had the nativist movement become that the O. U. A. Executive Convention of September 6th directed its members to work to give Thomas R. Whitney the Whig nomination for governor. When, after the Whig primaries, it was learned that nativism had failed of success in the interior of the state, the Whitney boom at once collapsed. Closely following the contest at the primaries

¹ Herald, 1854, August 29, p. 4.

¹ Argus, 1854, September 2, p. 2.

³ Tribune, 1854, September 1, p. 4.

came the nativist fiasco in the Whig state convention, and then the nomination of a Know-Nothing state ticket by the October Grand Council. The effect of these events was again to advance the nativists a step in evolution. It was now felt that the orders in New York city need not even struggle to secure control of the mechanism of the older parties, but might more easily take responsibility and put forth nominees independently. This was an entire abandonment of the earlier policy of nativism.

In October came the nominations of local tickets by the various parties and movements in city politics. The plans of the opponents of nativism now began to show themselves. On every hand the strength of nativist sentiment was recognized, and concessions were made to it. At the same time the managers of the older parties showed no intention of adopting alliance with the ambitious clique at whose head stood the Know-Nothing grand-president. The two factions of the divided Democracy united locally. It was clear enough that unless a fusion were made the party would lose the city patronage, and so the fusion took place. On October oth the two factions united on a mayoralty candidate in the person of Fernando Wood, member of the Know-Nothing Order and one of its city committee. The Democracy thus paid tribute to the nativist idea. On October 10th the Whig city convention was held, and resulted in the nomination of another member of the secret order, John J. Herrick. The Whig Party also paid its tribute to the newer movement by this act. nativist idea was now triumphant in New York city. Both of the older parties bowed low before it. There was a difference, however, between the nativist idea and the nativist organization, and, while the former had won its fight, the latter still had before it a battle for supremacy. The nominations of Wood and Herrick were of no advantage to the Barker clique. who controlled the Know-Nothing Order, and their plans were not abandoned. The temperance convention, manipulated by

nativists,1 met on October 13th, and brought James W. Barker before the public as its nominee. The Executive Convention of the O. U. A. followed, on October 16th, with a secret ticket headed by Barker's name. Then, on October 19th, the executive committee of the Know-Nothings completed the work by also selecting a secret ticket with Barker as chief member. The contest for the mayoralty now lay between the Know-Nothings and the united Democracy. In the short campaign that followed the nominations the ties that bound men together as Whigs or Democrats dissolved under the pressure of new issues. Each nominee on the tickets of the older parties found it to his interest to seek support from the adherents of one or more of the organized movements. The result was a marvelous criss-cross of influences, which divided the former compactness of the older groups into subdivisions on new lines of cleavage. Party tickets lost all unity of meaning or purpose. They were mere lists of office-seekers, each one of whom represented certain issues or certain cliques. State politics also intruded into the local canvass with suggestions as to the advantages of this or that choice.

In this scramble for advantage the nativist ticket, like the others, lost much of its identity. Three nominees, Barker, Ebling and Taylor, were grand officers of the Know-Nothing Order, and were looked upon as really representative of nativism, but the other five nominees were more closely attached to the older party systems. The chief fight was over Barker's name. All the bitterness of the city campaign was over the mayoralty. Despite the splendid service which Barker had rendered to the nativist movement, he had his opponents even in the ranks of the Order which he led. One ward council re-

¹ Post, 1854, October 31, p. 2.

³ Mayor, James W. Barker; Recorder, John H. White; Judge, Sidney H. Stuart; Surrogate (Alfred McIntyre withdrawn), Alexander W. Bradford; Register, John J. Doane; District Attorney, Chauncey Schaffer; Street Commissioner, Joseph E. Ebling; Almshouse Governor, Joseph S. Taylor.

fused to endorse his nomination. This was the council to which belonged Herrick, the Whig nominee. In other councils the opponents of the Barker clique took an attitude of hostility somewhat less pronounced. Barker nevertheless had the great mass of the organized nativists behind him in his claim for office. It was hoped that he might, by combining the nativist and temperance vote, win success. Barker had been identified with the temperance movement before he became prominent in nativism, but his devotion to the latter issue had weakened his hold upon the former. His friends had managed to keep control of the Temperance City Alliance, and to use it to bring him out as a candidate, but they could not keep all the temperance men in line, and a considerable secession of Temperance Independents took place, who refused to support the Alliance ticket. The following estimate of Barker's strength, made just before election by a friendly journal, shows upon what elements Barker based his hopes.* The estimate figured his following to consist of 11,000 members of the Know-Nothing Order, 3,000 members of the O. U. A., who were not Know-Nothings, 2,800 Protestant Irish members of the A. P. A., who were not Know-Nothings, 2,500 temperance men, not Know-Nothings, making a total of 19,300 votes. Barker actually polled 18,547 votes, and the foregoing estimate was probably not far wrong. The effort of the Whigs to injure Barker's chances by nominating the Know-Nothing Herrick was soon proven a failure, and the Whigticket fell into the background. The municipal-reform movement drew most of the anti-nativist Whigs to its support, and the reform ticket threatened serious rivalry. The real danger to Barker, however, was from the united Democracy, now desperately struggling to keep its grasp upon the city patronage.

The campaign work of the nativist managers was done

¹ Courier-Enquirer, 1854, November 2, p. 2.

² Ibid.

quietly under the cloak of council secrecy. There were no parades, no press arguments, no ostentatious efforts at vote winning. The existence of a nativist ticket could not be kept secret, and no effort to that end was made. For two weeks before election the Know-Nothing nominees were regularly advertised in the local press under the caption of "People's Ticket." Beyond this, however, the open work did not go to any extent. The support of Barker by the Protestant Irish is an interesting feature of the time. It is another instance of the fact that nativism, though nominally opposed to all foreigners, was nevertheless tolerant of Protestant foreigners, and received continued aid from them. Barker himself was a member of an A. P. A. lodge.

Election day came on November 7th. The nativists went to the polls quietly, but mustered their forces with the preciseness of developed discipline, thanks to the newly created machinery of the Know-Nothing city committee. Such was the complexity of local tickets at this election, that no very certain figures as to political groups can be made, but the official canvass indicates the following approximate strength of the various elements in the contest:

Nativist movement .									. about 13,520 votes.
City-reform movement									, about 11,430 votes.
Soft-Shell Democrats									. about 12,160 votes.
Hard-Shell Democrats									. about 9,380 votes.
Whig Party									. about 7,300 votes.
Agrarian movement.									. about 3,020 votes.
Temperance (Alliance) [no	ve.	me	nt				. about 1,920 votes.
Temperance (Independent	de	nt	a (201	vei	ne	nt		. about 1.380 votes.

The knowledge that a heavy vote was being polled for Barker made the nativists very sanguine of success by election night. The first returns seemed to show his election, and the

¹ Times, 1854, October 27, p. 5.

² Courier-Enquirer, 1854, November 4, p. 2.

³ Official city canvass in Times, 1854, December 5.

rejoicings over that event mingled with the popular joy over the supposed success of the Know-Nothing state ticket. Later returns, however, told a different tale. Wood appeared to be elected by a very narrow plurality. The election of four of the nativist nominees did not appease the wrath of the Knowings over the result on the mayoralty. At once the word was passed around that Barker had been counted out by fraud, and on the evening of November oth an immense indignation meeting took place at City Hall Park. A committee was here appointed to investigate the matter. Five days later a second mass-meeting heard a report of progress from the committee. Then, while the county canvass slowly dragged along, the nativist committee appeared before the canvassing board and presented evidence of alleged fraud against Barker's vote; but their mission was vain. The board refused to go behind the returns, and the law was such that there was no alternative but submission. Wood, therefore, took his seat with full legal title, but the fairness of the count which made him mayor remained a matter upon which opinions differed.

With the final decision in favor of Wood the local campaign of 1854 was ended and popular politics were laid aside until the spring should bring round the beginning of new contests. In the interval nativism stirred itself in the city government with efforts to secure the discharge of foreign-born employees of the almshouse and police service, but this plan failed. Outside of civic affairs nativism had little to do except attend the regular meetings of its secret lodges and swell the annual parade on February 22d. The warfare over, street-sermons had ceased. The Irish element had yielded to the inevitable and accepted the existence of nativist sentiment as a fact. Just once during the winter of 1854-55 was there a hint of A feud among the cliques of the racial conflict again. rougher element resulted in the killing of the pugilist Poole early in March. Because some Irish roughs were concerned in the affair, the friends of Poole took opportunity to rouse

race-feeling on the subject and there were threats of retaliation.² On St. Patrick's day, which came a few days after the murder, the city authorities thought it advisable to keep the militia at their armories ready for service.⁹ The day passed without riot and in a little time the feeling died away again. The incident showed that the force of nativist antipathies was not yet spent.

With the spring of 1855 came the usual preparations for the fall elections. Organized nativism was still growing and the Barker clique still directed its political fortunes. During the latter part of the winter the clique had been reaching out for more power and had won it. In the fall of 1854 there had been only two effective political societies in New York, the Know-Nothing Order and the O. U. A., but during the winter the accessions to nativism raised into importance the hitherto petty societies of the American Star Order and the Allenbranch Know-Nothings. It was useless for the Barker clique to seek power in the Allen branch, for that was outspokenly antagonistic. In the American Star they were more fortunate. The election of Jacob B. Bacon to be grand-president of that society brought about a re-organization of it in March, 1855. into a form which placed it in control of the Barker clique. Its members now began to be known as "Templars." About the same time a similar change was agitated in the political system of the O. U. A. and finally accomplished. Coincidently there appear in the O. U. A. two factions respectively friendly and hostile to the Barker clique. The inference seems fair that the Barker clique was seeking to capture the O. U. A. executive system also. Up to this time the local nativist movement was united in sentiment and action. From the beginning of 1855 there had begun to appear a faint line of cleavage on the slavery issue, but in the spring of 1855 the cleavage was not distinct enough to threaten the unity of the

¹ Herald, 1855, March 11, p. 1.

² Times, 1855, March 19, p. 4.

movement. The issue was forced upon the Know-Nothing Order by the adoption of the Cincinnati ritual in November, 1854, with its new third-degree oath. The acceptance of that ritual in New York in January was followed by some withdrawals of members, but in spite of this the Know Nothing managers kept their forces well in hand so that the rift was not apparent. In May, with practically a united sentiment behind them, they began to draw the nativist secret societies of New York city into a formal confederation for unity of political action. The scheme contemplated a representative city convention composed of delegates from each one of the nativist societies. The convention was to act by approval of local tickets and to co-ordinate all the societies in support of such nominees as might be so approved. The adoption of this plan would, of course, be a step toward creating a distinct American Party, including all the nativist societies, but not superseding any of them. A temporary convention held this project under advisement at repeated sessions in May, and finally on June 1st it appointed a committee headed by James W. Barker, to carry out the plan by organizing a new convention of the secret orders on June 13th."

At this time organized nativism was really the only political force in the local field which was both strong in numbers and united in feeling. The older parties were both divided. The Democracy, after successfully placing Fernando Wood in the mayor's chair, had relapsed into its former duality and now sullenly watched with unfriendly eye the vigor of nativism. The local Whig Party, after long preserving outward unity despite its internal dissensions, finally, in May, also split in two parts, respectively for and against Seward.³ The Know-Nothing Order secretly aided this division.⁴ The prospects

¹ Courier-Enquirer, 1855, March 18, p. 2.

¹ Herald, 1855, June 2, p. 4.

⁸ Herald, 1855, May 25, p. 4.

⁴ Times, 1855, May 31, p. 4; June 11, p. 1.

of the new nativist political confederation were therefore of the best. On June 13th the convention of delegates met with power to act as a central body. The Know-Nothing Order, as the dominant group in nativism, seems to have led in carrying out this new effort. The O. U. A. probably sent delegates also, but there was some opposition in the Order to cooperation with the Know-Nothings. Grand Sachem Butler declared officially, but ambiguously, that "while secrecy in council is just and commendable, mystery is ever to be condemned," and advised that the O. U. A. should not "hold confederate action with any mysterious body." On July 2d the Executive Convention endorsed this advice, but after a running fight through several sessions between the friends and opponents of confederation, the friends seem to have prevailed. The executive minutes do not give the reasons for this oppo-While this struggle was going on the American convention did its work and launched the American Party. The new party was not coherent or centralized. Practically the organized nativist movement had merely taken a new name without changing itself in any essential point. This convention was only a symbol of harmony of action and singleness of purpose on the part of the societies.

Coincidently with the apparent unifying of the local nativist movement an element of disunion at this time appeared in the shape of the slavery issue. During the preceding winter the followers of nativism had become aware that an unrelated issue was being forced upon them. This came about when the National Council adopted the Cincinnati ritual. At that time, however, the interest in the slavery question seems to have been so small that nativism felt no effects from the intrusion. During the spring of 1855 public interest began to turn more closely to the new issue, and when, in June, the news came of the new pro-slavery platform imposed upon the Know-Nothing Order by the Council at Philadelphia, it became plain that na-

¹ Executive records, O. U. A.

² Gildersleeve Coll.

tivists would not all accept it willingly. Although a great mass-meeting, on June 18th, in City Hall Park, ratified the new platform, its action did not bind the sentiment of individuals nor close discussion. Anti-slavery men outside the Order stigmatized Barker as a pro-slavery man and tool of the South. The slavery issue, thus stimulated, intruded itself into the Know-Nothing councils and joined itself with the growing opposition to the Barker clique. Soon there were two factions in New York city, one headed by James W. Barker and the other by Daniel Ullman.² The shelving of the Philadelphia platform by the Grand Council of the state, in August, 1855, was the first important set-back received by the Barker clique during its control of the Order, and the Ullman faction was instrumental in bringing it about.

Before its defeat in the August Grand Council the ruling clique had brought about the nomination of a local ticket. The nativists still exercised influence in the Whig Party in the summer of 1855, and the New York Tribune, which, in the middle of August, still considered itself a Whig organ, ventured to guess that they would try to use the Whig conventions to make nominations. The nativists used their own machinery instead. On August 20th a group of nine distinct conventions met on the same day to consider different offices and select nominees. The multiple number of these bodies was arranged to allow each council full expression for the different places involved. The completed ticket included eleven Whigs and six Democrats. While these nominees do not seem to have been personally objectionable, their selection was

¹ Tribune, 1855, June 20, p. 4.

² Justices Superior Court, Murray Hoffman, Lewis B. Woodruff; Judge Common Pleas, Alexander Spalding; Judge Marine Court, Arba K. Maynard; Sheriff, Joseph H. Toone; Clerk, Robert Beatty, Jr.; Comptroller, John S. Giles; Corp'n Counsel, Louis N. Glover; Almshouse-Governor, Isaac J. Oliver; Street Commis'r, Joseph S. Taylor; Repairs Commis'r, Joseph Southworth; Inspector, George W. Morton; Coroners, Frederick W. Perry, Samuel A. Hills, Cyrus Ramsay, John Witherell.

the signal for revolt. The overthrow of the Barker policy at the August session of the Grand Council probably aided the change. An anonymous pamphlet now appeared, whose object was to attack the ruling clique as a sort of secret conspiracy. In a curious way, however, the writer of the pamphlet awkwardly confounded the personal clique which he attacked with the whole society of the "Templars," to which the clique belonged. Forthwith the unlucky Order of the American Star, whose members were the so-called "Templars," became an object of attack. The Tribune reprinted the hostile pamphlet in full, and the Times aided the work by an exposition of the American Star ritual. Editorial articles were written to show that the Know-Nothing Order was the victim of a hitherto unknown higher degree. The "Templars" were represented as a group of secret conspirators, whose sole object was to control the Know-Nothing Order. attacks, in themselves, were absurdities, but they were patent signs of revolt against Barker and his friends. From words the enemies of the clique now passed to deeds. In Washington Chapter, O. U. A., to which both Barker and Bacon belonged, there were charges laid against them for the purpose of securing their expulsion.3 In the O. U. A. Executive Convention vigorous attacks were made on the local ticket on the ground of clique dictation, but the friends of the ticket, after a contest, forced the endorsement of it. As a sequel to their success came repudiations of the ticket from several O. U. A. chapters. It was about this time, too, that the hostile element in Barker's own Know-Nothing council moved to expel his friends from membership.4 The position of Barker as a nativist leader grew more and more precarious as the campaign went on.

¹ Tribune, 1855, September 5, p. 7.

² Times, 1855, September 5, p. 1.

⁸ Times, 1855, September 22, p. 1; October 15, p. 1.

⁴ Times, 1855, September 20, p. 8; October 17, p. 1.

In spite of internal troubles the work of the nativist campaign went on energetically. In 1855 the Know-Nothings affected far less of secrecy than ever before. In actual fact the secret order was rapidly losing its secret character by the work of unfaithful tongues among its membership. Many of the inner details of Know-Nothing politics were printed in the daily press. The New York Times for many successive weeks regularly reported the secret sessions of one of the ward councils, to show the flimsiness of the mystery which overhung the doings of the society. When it is considered that some of the ward councils had over a thousand members, it is perhaps astonishing that there could be even a pretense of secrecy in New York city. There were changes going on in the secret organization. There was a new current setting away from old methods, old leaders, and even from old princi-The ward politicians who now crowded into the secret councils carried on there the same sort of work that they were accustomed to do at party primaries. The managers of the nativist campaign adopted the regular system of the older party campaigns. The secret society was turning into an open political party. In the city campaign of 1855 no attempt was made to keep either the nativist nominations or nativist membership a secret. One of the features of campaign work was a system of political clubs in every ward of the city, guided by a central body called the National Club.* For the first time in New York state the secret movement used public speeches and torch-light processions to further its work. this point had the ultra-secret Know-Nothings come.3

The cohesion of parties in New York city reached its lowest point in the fall of 1855. At least sixteen local tickets,



¹ Times, 1855, May 24, 31, June 6, 11, 19, 26, July 11, 19, August 1, 3, 9, 10, 15, 29, September 12, 20, 26, October 2.

² Herald, 1855, October 6, p. 1.

⁸ The Allen-branch Know Nothings kept to old methods. Their ticket is in *Tribune*, 1855, October 10, p. 5.

representing various parties and issues, were in the field, and, as in 1854, there was a scramble of office-seekers for multiple nominations. Very few of the sixty-two aspirants who were seeking the sixteen local offices were contented with being named on a single ticket, and the result was a marvelous confusion. In this chaos neither the Whig nor the Republican organization was strong enough to make a real contest. The strongest combination in the field was that made by certain candidates who secured the backing of both of the Democratic factions. to them came those men who were backed by the nativist and the temperance movements together. When election day came the Democratic combination won place for those whom it favored, but the nativist combination was strong enough to elect half of the American ticket. As usual the Protestant Irish and German vote was cast in support of the American ticket at this election. Evidently the nativist movement was still gaining strength as a local force in New York city. this election it is difficult to estimate at all closely, even from the official canvass, the real strength of the various political groups that were in the field. Out of the sixteen local tickets, only ten seem to have been clearly distinct as factors in the result. Their approximate strength was as follows:2

Nativist movement					about 18,770 votes.
Soft-Shell Democrats					about 12,880 votes.
Hard-Shell Democrats .					about 11,280 votes.
Whig Party					about 4,300 votes.
Republican movement .					about 3,140 votes.
City-reform movement .					about 3,010 votes.
German Democrats					about 1,910 votes.
Half Shell Democrats .					about 1,390 votes.
Temperance movement.					about 900 votes.
High-License movement					about 670 votes.

The intrigues of presidential aspirants succeeded imme-

¹ Tribune, 1855, November 17, p. 5; Times, 1855, November 9, pp. 2, 8.

Official canvass in Times, 1855, December 6, p. 6.

diately upon the intrigues of local nominees and took up the attention of the Know-Nothing councils. George Law, the contractor, familiarly known as "Live-Oak George," was now in the field as a presidential possibility. An intense rivalry between the partisans of Law and those of Fillmore soon showed itself. James W. Barker appeared as a supporter of Law, and, having declined in advance a re-election as grandpresident, he began to regain something of his old popularity in the city councils. His own council, nevertheless, refused to send him again as a delegate to Grand Council. The work of Law's men brought good results in the city. The Live-Oak clubs, devoted to Law's interest, became crowded with the younger element, and at the district conventions held to elect delegates to the National Convention the Law men easily carried the city. All their work, however, was resultless. The ambitions of Law were checked by the nomination of Fillmore on February 25, 1856. When the news came of the action of the Convention the Americans of New York city promptly accepted the new ticket and swung out their campaign banners. An immense mass-meeting on the 29th gave enthusiastic welcome to Donelson, the vice-presidential nominee.

This harmony was not to be lasting, for under the surface of events the opponents of Fillmore at once began their work. Beginning in March the managers of Law's canvass re-gathered some of their supporters and in May the Law men and anti-slavery men worked together in the ward councils to elect delegates to appear for them in the anti-Fillmore conventions that had been called. As a consequence of this work new dissensions sprang into being in the Know-Nothing Order. The growth of the anti-Fillmore movement steadily developed ill-feeling and antagonism. On June 12th, when the anti-

¹ Times, 1856, January 23, p. I.

² Herald, 1856, March 22, p. 8. ³ Herald, 1856, May 11, p. 1.

Fillmore national convention met at New York the delegates found themselves attended by an angry crowd of their Know-Nothing brethren. The latter were massed about the convention hall and their derisive yells punctuated from time to time the proceedings of the session. The new dividing line within the Order grew more distinct than ever before when the anti-Fillmore national ticket was made with Fremont's name upon The Fremont men captured the National Club, on which the local party depended for campaign work, but at another session the Fillmore men drove the club president into the street and regained control. The ward council to which George Law belonged expelled him from the Order.* These incidents were symptoms of the new alignment that was going on. The effect of it was to weed out the anti-slavery and other disaffected members, and the absorption of these by the Republican movement left the nativist organization composed of faithful Fillmore men. The O. U. A. joined with the Know-Nothings in support of Fillmore.3 The secession of the North Americans from the Order at the August Grand Council received no support from New York city. The ward councils kept their allegiance to the regular grand body.

In September, 1856, the city campaign opened. Fernando Wood, by shrewd management, succeeded in getting a renomination from the regular committees of the united Democracy, but he was unpalatable to some of the local leaders and his selection created a new schism in his party. An irregular faction of anti-Wood Democrats set up an opposition candidate for the mayoralty. This split gave the Americans some hope of electing a mayor. On October 6th, when the local conventions were held, Isaac O. Barker, president of the board of aldermen and cousin of James W. Barker, received a mayoralty nomination from a convention over which the latter

¹ Herald, 1856, June 22, p. 1; Times, 1856, June 25, p. 1.

² Times, 1856, July 14, p. 4. ³ Times, 1856, August 2, p. 2.

presided, and headed the city ticket. At this campaign there were fewer political groups in the city than in the preceding year. The city contest turned upon the question of Wood's fitness for office. As mayor of the city and as a party man Wood had shown himself ambitious, clever and audacious. He had set himself the task of controlling the local Democratic organization and had done his work with enough success to create some bitter enemies. Barker, the American nominee, was experienced, popular and respectable, and he attracted support to the nativist ticket by his character. Unfortunately for those who opposed Wood, the opposition elements could not be brought to unite upon one candidate. Each political group stubbornly held to its own man. consequence, Wood easily carried the masses with him and won the mayoralty again. Nativism in this campaign made little pretence at secrecy. It had almost reached a likeness to the every-day form of political party. It had its clubs, its banners, its processions and its mass-meetings, and this adoption of new ways seemed to be justified by the poll of a larger vote than it had ever before mustered in New York city. the state at large the decline of the nativist movement had begun some time before the election of 1856, but in the metropolis the climax was at the election of that year. Until that time nativism splendidly held its own in the city. The averages for the local contest follow:

Democratic Party								about 32,480 votes.
Nativist party								about 23,470 votes.
Republican Party								about 13,400 votes.
Anti-Wood Democ	:T8	ts						about 5,850 votes.
City-reform moven	ıeı	at .						about 3,640 votes.

After the excitement of the presidential campaign came a



¹ Mayor, Isaac O. Barker; Judge, John H. White; Almshouse-Governor, Benjamin F. Pinckney; Corp'n Counsel, Louis N. Glover.

² Official canvass in *Tribune*, 1856, December 5, p. 3. In this election there was evidently great use of split tickets, but apparently without organized support.

decline of popular interest in politics. The winter of 1856-57 was devoid of political features. The decline of the Know-Nothing Order was by this time generally recognized as a fact and politicians began to turn away from it. By the summer of 1857 the nativist secret societies of New York city were going to pieces rapidly. Those members whose interest in the ideas of nativism was only superficial began to drop away from the movement as soon as the tide of success turned. The secret societies lost heavily when once the change became apparent. In August, 1857, the Know-Nothing Order lost its secret system by the action of the Grand Council, and though the ward councils kept their organization in the face of the change, yet about half their membership fell away. The O. U. A. chapters suffered equally by the deser tions from their ranks. The lesser societies of the "Templars" and Allen-branch Know-Nothings disappear from public The fate of these latter societies is not clear. An organization of this sort dies obscurely as a rule. First there comes a loss of membership, followed by retrenchment of expenses and removal to cheap quarters. Then the society meetings pass out of public notice and are held irregularly. Finally a knot of faithful ones yield to the inevitable and decree their own dissolution. It is uncertain how long the "Templars" and Allen Know-Nothings kept their societies alive, but it is clear that they lost all political importance in 1857.

Amid this crash of organized nativism the political leaders of the movement turned toward the local Republican Party with friendly mien. The old bitterness between the two movements was now passing away. The masses of organized nativism had by this time become tinctured by antislavery ideas and at the same time the attitude of the Republican Party had been affected by the influx of recruits from nativism. After the losses met by the nativist movement in New York city, its only hope of success in local elections was

to exchange support with Republicanism, and if possible, to overpower the Democracy by united forces. Late in September this plan of operation was advocated by a mass-meeting of nativists in one of the city wards and seemed to meet general approval. The practical working out of the idea was slow. During October the city conventions of the two organizations held frequent sessions, accompanied by negotiations between those interested. Eventually, by a series of mutual accommodations, a union ticket was perfected bearing the names of eight nominees, of whom each party furnished four.² Similar fusion of forces took place in the legislative districts of the city. This began the merging of the American and Republican movements in New York city. Never again after 1856 did the nativists enter the field with a full local ticket and depend on their own strength alone. Their power was gone. In 1857 and after, their leaders sought advantage only by combination. The fusion of 1857 was not as fortunate in results as its makers had hoped. Its whole strength proved to be only 21.700 votes, far less than the vote of the Democracy. The fusion failed to elect a single nominee. The vote of the nativists on the local ticket this year cannot be separated from that of its allies, but the local vote on the several state tickets gives a clue to the relative strength of parties. The averages are as follows:3

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Democratic Party . . . . . . . about 37,680 votes. Republican Party . . . . . . about 13,560 votes. Nativist party . . . . . . . . about 8,480 votes.
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The weakness of organized nativism was now apparent to all. In 1857 a new city charter went into effect in New York which separated the elections of city officers from those of

¹ Tribune, 1857, September 28, p. 6.

² Judge Superior Court, Benjamin W. Bonney; Judge Marine Court, William H. Browne; Recorder, Alexander Spaulding; District Attorney, Daniel Ullman.

Official county canvass in Times, 1857, November 26, p. 7.

county officers. The latter continued to be chosen in November, while city officers were elected a month later. After the November election of 1857 the local parties at once turned to the mayoralty contest. The Americans on November 9th nominated James E. Cooley for the office with the evident intention of forcing his nomination upon their new political allies. This plan was frustrated by the appearance of a strong independent movement which put forward Daniel F. Tiemann as nominee. Tiemann had been one of the leaders in the early nativist movement of 1843-47. When the Republicans joined the adherents of Tiemann the nativist nominee, Cooley, withdrew from the race. The nativist vote was thrown for Tiemann and aided his election on a small plurality.

The break-down of organized nativism went on steadily into the year 1858. The Know-Nothing Order had now passed away. The ward councils remained, but they were non-secret political clubs exercising the powers of party primaries. O. U. A. tried to stem the tide of dissolution by an attempted re-organization of its executive system, but the effort was a vain one. The chapters of the Order were now breaking up. On October 11th the Grand Executive Convention met for the last time. All political work then centered in the grand executive committee. Other nativist secret societies in New York were also feeling the strain of reverses caused by wholesale withdrawals. The whole fabric of organized nativism was giving way. In the local elections of 1858 the coalition of Americans and Republicans was brought about easily. The two party conventions delegated powers to a joint committee which divided the offices of the local ticket between the parties. Each convention then nominated men for the places at its disposal. The Americans had four offices for themselves. This year the fusion ticket gained a support of 29,450

¹ Gildersleeve Coll.

² Clerk, W. F. Davidson; District Attorney, Rufus F. Andrews; Coroners, Samuel Hall, J. S. Schofield.

voters, but still it fell short of the Democratic strength and failed to put its men into office. On the state ticket the voters of the city divided as follows:

Democratic Party								about 40,850 votes.
Republican Party								about 21,590 votes.
Nativist party								about 7,120 votes.
Temperance move	me	ent	١.					about 50 votes.

In the city elections of December the Republican and American fusion fell apart on one office and the American nominee secured a personal vote of 12,290, composed of various elements.² At this election, owing to a split in the Democracy, the Republicans were for the first time able to carry an election in New York city.

The story of local nativism grows more and more brief. In due time the campaign of 1859 came on and again a local fusion of Americans and Republicans was arranged, which was continued in the city election of December. In both elections the identity of the nativist forces was merged, but the canvass on state ticket showed the following local poll for the November contest:³

Democratic Party		•	•		•			about 34,300 votes.
Republican Party								about 18,200 votes.
Nativist party								about 4.110 votes.

Finally, in 1860 came the memorable presidential contest with its re-arrangement of parties. The local leaders of the American movement cast in their lot with one or the other of the great national organizations. True to the traditions of the American movement, many of them joined the new Union movement with Bell and Everett as their national ticket. This was mostly true of the element led by Erastus Brooks.

¹ County canvass in Tribune, 1858, December 3, p. 3.

² Almshouse-governor, Frank C. Wagner.

Official county canvass in Tribune, 1859, November 26, p. 3.

Some others gravitated to the Republican Party. It was noted by the daily press among its minor political items of the campaign that an American county convention met on October 9th, and adjourned without making nominations.¹ In a very few cases there seem to have been American nominations in assembly districts. Practically, however, the American Party was blotted out in the excitement of the national campaign.

This was the end of the American Party in New York city, but it was not the end of organized nativism. remnants of the O. U. A. kept a feeble hold on life during the stress of war time, but ended finally in 1866, having had no political influence since 1850. Then, about 1866, a new nativist organization began in New York city. It was a secret society modeled after the Know-Nothing Order, and headed by James W. Barker, the former Know-Nothing leader. At first called the Order of the American Shield, it soon took the name of the Order of the American Union.² This society planned for political action, but was never effective in effort. It lived a number of years, but failed to meet popular favor, although it is said to have found foothold in sixteen states. It died out about 1880. Then the new American Patriotic League essayed to revive nativism and failed. It gave place to the more recent American Protective Association.

¹ Tribune, 1860, October 11, p. 8.

² Information from former members.

CHAPTER X

THE LATER STATE CAMPAIGNS, 1857-1860

THE campaign of 1856 left the American movement in New York state exhausted, but the leaders of its state organization were not yet ready to acknowledge the futility of further effort. In the summer of 1857 it began to be seen that the year would be a "quiet" one, politically. In the field of state politics there was a reaction against the forced sentiment of anti-slavery and also the usual apathy following a presidential contest. The re-arrangement of parties which had kept the political world in a ferment for four years past seemed to be now about completed also. The leaders of political nativism viewed these new and unusual conditions with hopefulness. It was thought that the reaction against anti-slavery might bring former Know-Nothings back to the fold from which they had strayed, while lack of interest in politics might keep from the polls the unorganized voters of the opposition forces. Sanguine nativists dreamed of re-claiming the membership that the movement had lost and of again making a grasp at the control of the state. Less sanguine and more practical leaders saw that much could be gained in any event by a large poll of their party in November, even though the state were not carried. There was consequently no real opposition to the plan of setting up an American ticket for the fall election. The matter was thoroughly talked over by the delegates at the August Grand Council.

In obedience to the call of the Grand Council a state convention met at Syracuse on September 15, 1857. The grow-

1 Account from Herald and Times reports.

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ing weakness of the party was made apparent by the absence of delegates. A full convention would have had one delegate from each assembly district, but eighty-eight districts were unrepresented. The convention organized with Henry B. Northrup, of Washington, as president, and passed at once to the nomination of a ticket. Seven state offices and one judgeship were to be filled by the people at the coming election. The American convention named candidates for each of these offices, dividing the honors evenly between former Democrats and former Whigs. The completed ticket stood as follows:

After the selection of a ticket came the adoption of resolutions as to the political ideas of the American organization. These resolves were in effect a regular campaign platform, and this marked yet another step in the tendency of the Americans to approach the common party model, for heretofore the making of platforms had been part of the work of the Grand Council. The present convention formulated the following document:

Returning our devout and humble acknowledgement to Almighty God for His protecting care and fostering mercies in the past, we invoke His continued assistance to enable us to act the part of good citizens and patriots by a watchful oversight of our free institutions and a zealous maintenance of our civil and religious rights, so that this glorious Union, bequeathed by heroes and martyrs, shall forever remain an altar to Liberty and an asylum for the oppressed.

Resolved, That the American Party of the state of New York is a component part of the great family of American freemen who believe in the right of native-born citizens to shape the policy, administer the government and make the laws of their own country; who furthermore, cherish the Union as a sacred legacy of the past, to be maintained at any sacrifice; and who, finally, in the spirit of their

¹ Text in Times, 1857, September 16, p. 1.

revolutionary sires, are prepared to swear upon the altar of Liberty eternal hostility to every form of oppression.

Resolved, That the American Party of the state of New York demand the enactment of a registry law for the protection of legal voters and the purification of the elective franchise from foreign influence controlled by unscrupulous politicians.

Resolved, That the American Party of the state of New York believe that the Bible should be read by all men and that, therefore, it is a proper text-book in our public and common schools, not to be discarded by wise men who would inculcate the sentiment of religious freedom in the youthful mind.

Resolved, That the experience of the past five years has conclusively shown that the exemption of railroads from the payment of tolls by the legislature of 1852 was unwise and impolitic, and that while the people of the state are suffering from oppressive taxation, sound policy requires the re-imposition of the tolls on such of those great monopolies as come in competition with the public works of the state.

Resolvea, That we condemn the system of free passes, as furnished by our railroad managers to our legislative and judicial officers, and we recommend to the next legislature the passage of a law making it a penal offense for railroad corporations to offer, or for state officers to receive, such free passes.

Resolved, That we express our entire confidence in that greatest of state improvements, the Erie canal, believing it fully competent, if properly and economically managed, to pay for its own enlargement and discharge any debt incurred for its benefit without resorting to direct taxation; and we declare ourselves in favor of its speedy and immediate enlargement, and our firm determination to resist to all time its sale or any other disposition of it whereby it will pass out of the control of the state.

Resolv. d, That the unwise, unjust and infamous legislation of last winter, as shown in the passage of laws for the benefit of monied monopolies in opposition to the direct interests of the people; as shown in nearly exempting the railroads of the state from taxation and heaping this burden upon the people; as shown by way of enormous appropriations of money for the benefit of party favorites, whereby the taxes of the state are increased more than 125 per cent, the treasury empty and the state bankrupt; as shown in the control which an avaricious and unscrupulous lobby, headed by Republican politicians, exercised over the legislature; as shown in sacrificing the canal interests and canal revenues of the state to the all-powerful interests of railroad corporations; as shown in not passing a registry law as the people desired, the so-called Republican Party, under the management of an Albany Central Regency, has forfeited the respect of honest men of all parties and deserves that it should receive the entire condemnation of the people.

Resolved, That the mis-called Democracy of the day, by its truckling to the powers of popery and foreignism and its combination with Republicanism to defeat Americans, and thereby subvert the wishes of the people, as witnessed in the combination in the Assembly of 1856 in the election of the speaker and in the more recent act by which their leaders struck hands with a renegade American to strip



the Canal Board of the state of the power vested in them by the people, deserves and should receive the condemnation of all men.

Resolved, That we, the Americans of the state of New York, fully persuaded of the justness of our cause and the correctness of our principles, will firmly adhere in every emergency and under all circumstances to the great and distinctive doctrines of the American Party, as laid down in the Binghamton and Troy platforms, repudiating all alliances and combinations which involve any sacrifices of principles or abandonment of those demands which we believe so vitally important to the welfare of the state and of the whole country.

The foregoing platform was adopted by vote of the American state convention, and then, after appointing a new state committee, the delegates adjourned. The new committee was composed of Zopher Mills, of New York; Samuel I. Wilkin, of Orange; Henry Q. Lansing and L. Sprague Parsons, of Albany; John N. Wilder, of Saratoga; N. B. Milliman, of Washington; Richard F. Stevens, of Onondaga; J. N. Starin, of Cayuga; Addison M. Smith, of Otsego, and Lorenzo Burrows, of Orleans. The action of the Syracuse convention placed the American Party in an attitude of emphatic independence. The denunciations of rival parties in its platform and the thoroughly nativist personnel of its ticket made clear the fact that its spirit was not broken by its recent losses. The American state ticket was a very strong one personally. Nearly every nominee had previously held public office with distinct success. Putnam, of Erie, had served as state senator. Benton, of Herkimer, had been secretary of state. All the others on the ticket were well-known men. The opponents of the party had no fling to make against the nominees that it set up. With this ticket the American organization entered the contest of 1857.

The campaign of this year was singularly lifeless. Each party that was in the field affected to have issues, but the voters did not respond to those which were offered. The Republicans tried to use the slavery issue, but with indifferent success. The Democrats raised the cry of mismanagement and corruption at Albany, but failed to excite universal horror

thereat. The Americans pointed out to the voters the shortcomings of both their rivals. The campaign was not a battle of issues, whatever the party managers might claim.1 It was rather a battle of organizations. As the campaign progressed it became evident that there were changes going on among the voters. Many Democrats who had supported Fremont and other Republican nominees in 1856 came back to their old party in 1857. The similar movement from the Republican ranks back to the American Party, for which the nativists had looked, did not take place. Instead of it a movement went on away from organized nativism. In October there came reports from various points in the state of local alliances between the American and Republican forces. In New York and Kings counties, the strongholds of nativist activity, a fusion of this sort took place. It indicated a drawing together of the parties, and was significant. It showed that the people could no longer be greatly swayed by the old arguments of nativism. While these changes were quietly going on the public as a whole showed little real interest in politics. It was still so when election day came around. Everywhere there was apathy and indifference. More than a hundred thousand voters stayed away from the polls altogether. The party averages footed up as follows:

Democratic Party.						about 195,300 votes.
Republican Party.						about 177,600 votes.
Nativist party						about 66,200 votes.

The indifference of the people had worked a great change in the political situation by this showing. While the Democracy gained enough votes to keep its average equal to that of 1856, the Republican vote shrunk one-third and the American Party, still more unfortunate, lost one-half of its poll. In 1856 the nativist movement cast 22 per cent. of the total vote,

¹ Times, 1857, September 25, p. 4.

² Official figures in Times, 1857, November 25, p. 3.

but in 1857 it cast only 15 per cent. Its actual weakness could not be concealed after this showing. In the light of the November canvass its whole campaign looked like a mere piece of bravado. It no longer had innate strength. Its ultimate absorption by its great rivals was a certainty. The only question was as to the length of time which the process of absorption would occupy.

After the futile campaign of 1857 the nativist party sank out of public notice until the steady round of time roused politicians for the recurring annual struggle. In the summer of 1858 the politics of New York began to feel the first faint hints of the next presidential contest. It was the year for election of the governor, and the governorship was prized by party managers as an aid to party strength. More than that, the election would be, in the eyes of the nation, a test of Republican strength in New York. The gossips of the political world still viewed Senator Seward as a presidential possibility. but the election of 1857 did not augur well for Republicanism in New York, and if the election of 1858 did no better, the prospects of Seward would indeed be clouded.1 Organized nativism received due notice in connection with this situation. The fusion of Americans and Republicans on local tickets in several counties during the campaign of 1857 had established a vague sort of kinship between the parties. No one dreamed now of the American Party carrying a state election by its own efforts. People were only interested to know whether the Americans would join the Republican Party in the present campaign or whether they would hold back for another year. The implacable hostility that nativism had exhibited toward Senator Seward still existed to a very considerable extent. If that hostility could be overcome the fusion of the two parties would almost certainly carry the state. If it could not be overcome then the success of Republicanism would be in doubt.

1 Herald, 1858, October 18, p. 4.

The annual session of the American Grand Council was held this year at Albany. It convened August 24th, with fifty-seven counties represented. After the president's address the election of officers made Henry B. Northrup, of Washington, president, Goldsmith Dennison, of Steuben, vice-president, James W. Husted, of Westchester, secretary, and Richard F. Stevens, of Onondaga, treasurer of the state organization. After this election the matter of calling the annual state convention came before the Council. This was the point around which the interest of politicians centered. The state convention of the Republican Party had already been called. It was to be held on September 8th at Syracuse. A delegate in the Grand Council moved that the American state convention be held at Syracuse on September 8th. The purpose of the motion, plainly enough, was to pave the way for an alliance of Americans and Republicans in the state campaign. The debate upon the proposition showed the existence of two very earnest but opposing groups in the Grand Council. On one side there was a friendliness for Republicanism that looked with satisfaction upon the prospect of a close political alliance. On the other side was an equally strong dislike for the party whose leaders had so long been the outspoken foes of nativism. debate was vigorous. When the vote was taken the friends of the Republican alliance were victorious by 163 ayes to 63 noes. This ended the work of the council session.

In accordance with the call of the Grand Council the convention met at Syracuse on September 8th.² It organized with Daniel Ullman as presiding officer, and its first business was formally to receive a committee sent to it by the Republican convention. The Republicans desired a conference for the purpose of agreeing upon a common platform. It was the first step toward merging the weaker party into the stronger. Before the day's session closed, the American convention had

¹ Account from *Tribune* report.

³ Account from Herald report.

appointed a conference committee and the committee had begun its work. In the American convention, as in the Grand Council of August, there were two factions respectively favoring and opposing the new alliance. In the Republican convention the general opinion seems to have favored the union of the parties. But while the assembled delegates were thus friendly to a fusion, some of the Republican political leaders were not so. Their objections can only be guessed at, for no one stood forth to fight the plan openly. On the morning of September oth, when the two conventions again took up their work, each body received a report from its conference committee giving the results of the committees' session. ference had drawn up a platform in which were embodied the anti-slavery ideas of Republicanism, together with a slight hint of nativism. In deference to the American Party the antislavery doctrines had been softened in expression. nativist portion was a demand that one year should intervene between naturalization and voting. When this new platform was presented to the American convention the delegates promptly ratified it and awaited results. In the Republican convention the new platform was juggled out of existence by the skill of some hidden wire-puller. Instead of being placed before the convention it was sent to committee and returned in a revised form for approval. Then, being sent to the American convention in its new form, it was greeted with an indignant burst of anger because of the changes which had been It was now too late to go back over the ground and correct the blunder. Both conventions proceeded at once to the nomination of state tickets. The Americans put in nomination some of their best known leaders, and so effectually ended all chance of coalition. The ticket follows:

 There was no struggle in the convention for these places because there was no hope whatever of election to office. The tender of a nomination at this time was only a compliment. As usual, a new state committee was created before adjournment. Its members were George Briggs, of New York, William B. Lewis, of Kings, John C. Feltman, of Albany, Orville Page, of St. Lawrence, N. R. Ford, of ______, M. T. B. Fisher, of ______, Jacob B. Faurot, of Ontario, and Gustavus A. Scroggs, of Erie.

There is almost nothing to say of the campaign of 1858 so far as the nativist movement is concerned. The American ticket was only a device to keep the party from going to pieces. There was no effort to gain new adherents for the movement, because it was understood that such effort would be vain. The most that could be hoped was that the maintenance of the American Party would prevent Republican success. The pride of the nativist leaders was much hurt by the slight put upon them by the Republican convention in September. They wished Democratic success now, rather than Republican. Their work toward this end showed, when election day came, that the American vote could still be held together and the process of disintegration checked, if not overcome. There was still too much vitality in the party to permit the utter disappearance which its opponents had prophesied. It was still to be considered as a factor in state politics, in spite of its weakness. In actual poll the Americans showed very slight change from 1857. At this election the voters of the state who had staved at home in the fall of 1857 showed a revival of interest in politics. Both of the greater parties profited by the revival, but the Republicans were the most favored and were able to carry the state. Following were the averages on the state canvass:1

¹ Official footings in Tribune, 1858, November 20, p. 5.



Republican Party about 249,800 votes.

Democratic Party about 230,100 votes.

Nativist party about 61,800 votes.

Temperance movement about 2,500 votes.

One effect of this campaign upon the American Party was to make plainer the dividing line between those who approved and those who disliked Republicanism. The side which leaned toward the Republicans was headed by Gustavus A. Scroggs, of Buffalo, while the more staunch adherents of nativism looked to Erastus Brooks for leadership. The slight put upon the Americans at Syracuse set back the friendship for Republicanism, but as the months passed on that sentiment seemed to recover itself somewhat. When the regular annual session of the Grand Council came again, both elements of the party were on the ground. The Council of 1859 met at Geneva on August 23d. The press reported 140 delegates at the sitting, but very little detail of the Council session came to the public. New officers were elected and a state convention called. Also, two delegates, Erastus Brooks and Lorenzo Burrows, were chosen to attend an American national convention, if one were held. The new state officers were: President, Gustavus A. Scroggs, of Erie; vice-president, Amos H. Prescott, of Herkimer, and secretary, James W. Husted, of Westchester. There seems to have been no clash of opposing ideas at the session.

The American Party had its last campaign in 1859. On September 21st its last state convention met at Utica.² Under the presidency of Erastus Brooks it adopted an address and platform. The selection of a state ticket was sent to committee for recommendations. The state organization had given up the idea of an independent state ticket a year previous, but circumstances had forced it to break its plans at that time. This year there were no obstacles whatever to the adoption of

¹ Account from *Herald* report.

² Account from *Herald* reports.

a new policy. In its weakness the nativist organization now proposed to go back to the old system used in the infancy of the nativist movement. It would set up a ticket composed of names selected from the tickets of the greater parties, and as a "balance-of-power party" it would hold its huge rivals at its mercy. The committee on state ticket did its work on this plan. It reported back to the convention a list of nine nominees for state offices, five of whom were on the Republican ticket and four on the Democratic. None of them were known to have shown any special favor to nativism in the past. The ticket did not, in fact, represent the issues of the American movement, nor did the committee present it as such. Like the state ticket of 1858 it was a device to hold together the nativist vote and win such prestige for the organization as it might. It was made up as follows:

When presented to the convention there was a vigorous objection to the name of Dorsheimer, who was German by birth. Although the American Party had abandoned before this its wholesale condemnation of all persons of foreign birth, still it was rather a novel step for it to present an alien as its preference for a state office. Nevertheless after some debate the committee ticket was adopted by the convention. Scroggs brought this about by his championship of the cause of his fellow-townsman. After the ticket the convention appointed the usual state committee and adjourned. The new committee was composed of Erastus Brooks, Joseph W. Savage and

Frank C. Wagner of New York, L. Sprague Parsons, Henry Lansing and G. Y. Johnson of Albany, N. B. Lord of Jefferson, William A. Russel of Washington, Harvey Smith of Rensselaer, J. Matteson of Oswego, Orville Page of St. Lawrence, Richard F. Stevens of Onondaga, M. Strong of Monroe, Lorenzo Burrows of Orleans, Elam R. Jewett of Erie, and E. S. Sweet of Tioga.

In the campaign that followed, the American Party took no considerable part. Its wholly artificial character was so apparent that it lost heavily among those who had till now held themselves faithful to its fortunes. Some of its leaders, among whom was the state secretary, made a formal protest against the mixed ticket and circulated the protest in the party. In the O. U. A. there was an earnest outcry against the nomination of Dorsheimer. In response to this revolt the American state committee issued a circular defending the ticket.2 Five reasons were alleged for the nominations: first, the wish to return to the old idea of holding a balance of power between the greater parties; second, the wish to secure good men for office; third, the idea of punishing the Republicans for efforts to weaken the Canal Board when it was under American control; fourth, the hope of allaying the antislavery agitation; fifth, and most important of all, the frankly avowed desire to break down the calculations of the greater parties in order to demonstrate that the American Party was not a nonentity in politics. The circular, between the lines, was an acknowledgment that the sole issue of the American organization was that of its own existence. break-up during the coming presidential campaign was almost certain, but its leaders wished to maintain their hold upon it until that time and to keep it apart from either one of the two great parties. The party continued to lose heavily in the

¹ Herald, 1859, September 29, p. 6.

² Text in Tribune, 1859, October 5, p. 5.

campaign of 1859, but it polled a vote of unusual significance at the November election. The two great parties happened to rival each other closely enough in their vote so that the dwindling American organization, despite its losses, actually held the balance of power. With one exception its nominees were elected by reason of its endorsement of their names. Thus in its last effort at a state campaign the party scored a success. The party averages follow:

Republican Party.						about 251,300 votes.
Democratic Party						about 227,600 votes.
Nativist party						about 23,800 votes.

The politics of the national campaign of 1860 began very early in the year to shape themselves around the central debate on the great sectional issues. The leaders of the American Party in New York unhesitatingly took sides when occasion required. The nomination of Bell and Everett by a national convention on a "Constitutional Union" ticket enlisted the prompt support of some of the best known nativists. When, in July, 1860, a state convention of the Union movement was held at Utica, the list of those present included Brooks, Scroggs, Burrows, Prescott and several other wellknown Americans.² At that convention it became evident that the portion of the party which accepted the leadership of Brooks would support the new movement. Scroggs, the upstate leader, also had his following in the party, and though he appeared at the Utica convention in July, it was yet generally understood that his sympathies were with Republicanism. The annual Grand Council session was accordingly looked forward to by the politicians of the state with the liveliest interest. It was felt that the nativist party would be manipulated by its leaders so as to aid either the Bell national ticket or the Lincoln national ticket, and that the process of manipu-

¹ From vote as given in Tribune Almanac.

² Herald, 1860, July 13, p. 4.

lation would not be without interesting features for the world outside.

In the matter of interest the anticipations of party men were not disappointed. When the Grand Council came together on August 28th at Schenectady there were two factions keenly looking for advantage. President Scroggs and Secretary Husted favored the Lincoln ticket, while Vice-President Prescott favored the Bell ticket. The Republicans thus had the official machinery of the session in their hands although they were outnumbered on the floor of the Council. At first President Scroggs refused to announce the place of meeting but a squad of Bell men were set to watch his every motion, lest the Lincoln men should quietly open the Council with their fellowdelegates absent. Under this scrutiny the president yielded and the Council was formally opened with both factions pres-The next step was the critical one. Scroggs attempted to appoint the usual committee on credentials. Since this committee would have power to bar out delegates from the session its make-up was important. The Bell men were determined that Scroggs should not name the committee, and his efforts to do so were howled down. When he persisted in his effort he found himself surrounded by an excited mass of delegates who forced him to yield the gavel to Vice-President Prescott, known to be a Bell man. Scroggs and his friends then left the Council. Under Prescott's leadership the remainder of the council session was peaceful. There were 168 delegates at this last session of the Grand Council. They elected officers for the ensuing year in the customary way, choosing Amos H. Prescott, of Herkimer, for president, Jesse C. Dann, of Erie, for vice-president and William D. Murphy, of Albany, for secretary. Then came the work of delivering the votes of the organization, so far as official action could do it, to the new Union movement to which the American Party leaders had given their allegiance. A resolution was passed

¹ Account of Council session from Herald and Tribune reports.

by the Council endorsing the action of the Union movement in naming a state ticket of presidential electors, and this was followed by another resolution formally pledging the support of the Council to Bell and Everett. This officially merged the nativist movement into a different political group. But while these things were being done by the regular Grand Council the bolters, led by Scroggs, had no mind to be ignored without protest. They gathered together in another place and organized themselves into a rival Grand Council, following the regular procedure of the party. They elected officers for the ensuing year: Gustavus A. Scroggs, of Erie, to be president, A. J. H. Duganne, of New York, to be vice-president and James W. Husted, of Westchester, to be secretary. They passed a resolution declaring that since there was no American ticket in the field, either state or national, the members of the party should be free "to vote as their judgment and consciences may dictate." Then they named a new state committee and adjourned.

Both of these groups of delegates realized thoroughly that the organization which they represented was at its end. Many people thought that for the past three years it had been kept alive for this emergency. Neither one of the rival grand councils provided for a state convention to follow, though both bodies appointed state committees as had been the custom. ular Grand Council gave to this new committee power to call a session of the Council at such future time as it might fix. The committee was composed of Erastus Brooks, L. W. Parks, Frank C. Wagner and George Briggs, all of New York, L. Sprague Parsons, S. H. Calhoun and C. H. Adams, all of Albany, Harvey Smith, of Rensselaer, Abel Smith, of Schenectady, N. B. Lord, of Jefferson, Richard F. Stevens, of Onondaga, M. Strong, of Monroe, Lorenzo Burrows, of Orleans, Jesse C. Dann, of Erie, Harlow Hakes, of Steuben, and E. B. Sweet, of Tioga. The naming of a new committee was at the same time largely a pretence. The adjournment of the two

grand councils was the final end of the old Know-Nothing organization in New York state. By the usual custom the Grand Council should have met again one year afterward in August, but when the next August came round the nation was absorbed in war and there was no room in popular thought for political nativism. The nativist party in New York state politics ended on August 28, 1860.

CHAPTER XI

ANALYSIS OF POLITICAL NATIVISM

In final comment upon that political nativism which struggled for recognition during the quarter century from 1835 to 1860 it is as unfair to speak with entire harshness as it is difficult to speak with complete sympathy. As an issue that failed of success and as a doctrine from which the American democracy turned away, it stands condemned by its own failure. Yet, even as a rejected political issue it has an importance in history as one of the great forces which have aided in rounding out the ideals of the nation. In looking back upon nativism and its efforts, a curiously contradictory feature suggests itself. From the modern standpoint its aims seem to have been narrow, proscriptive and un-American, while in their day thousands of earnest men deemed them to be most thoroughly patriotic and truly American in character. explanation of this contradiction gives a reason for the study of rejected issues. The real work of nativism was to force public opinion to a judgment upon certain propositions, and in so doing to secure a decision as to whether or not the ideas which it represented were entitled to be considered as "American" in character. Political nativism was a curiously blundering effort to shape public opinion. It put forth views which were neither soundly logical nor consonant with the liberal tendencies of American society. For this reason. largely, they did not succeed. There can be no question as to the sincerity and patriotism of the men who forced nativism into the field as a political issue. They believed most fervently that the influences they opposed were undermining the **[440**

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whole structure of American life. If these men were narrow and proscriptive they were at least honestly so. If they were un-American, it was because the public consciousness had not revealed itself enough to teach them where they stood. It was the judgment of the people upon their work which eventually decided that nativist ideas were not wholly to be accepted as really American. The movement of nativism had its brief hour of strength; it stirred men's minds profoundly for a time and then it passed away, having accomplished little of what it had tried to do. Yet, as it disappeared, it left behind it a deeper insight into the theory of American life and a firmer faith in American institutions, both resulting from its agitation. It left behind it, too, more definite ideas and broader sympathies to solve the problems connected with the coming of foreign peoples to American shores.

Nativism was antagonistic to the Roman Catholic church. This antagonism was its most cherished feature. The Catholic church in the United States had then a membership very largely of foreign birth, and was in the position of a foreign institution transplanted to American soil. In some states it was dominated by the American element, but in New York it was the symbol and strength of foreign influence. held itself aloof from too close contact with American life, and it steadily opposed the adoption of American methods in its work. It organized its people into a distinct community and it encouraged clannishness based upon religion. aloofness was the real grievance against the church and caused it to be denounced as an un-American organization. nativist movement placed its arguments clearly on this basis it could have more easily defended its policy, but it preferred to adopt the theory of papal hostility toward America. This latter idea came from the Brutus letters of 1834, whose theories tinged anti-Catholic teachings through the whole period of nativist effort. From the hints given them by Brutus the nativist agitators learned to picture the Pope as an

ambitious despot longing to overthrow republican institutions. They learned to portray the Roman church as an engine of terrible power, directed by a crafty and unscrupulous priesthood which desired the subjection of a free people to its malevolent sway. All this could hardly be else than the exaggeration of enmity, but still it was used by nativism because it proved effective in agitation. At the time when nativism flourished, the American people were not yet fully convinced of the permanency of the structure they had raised. public mind was distrustful of European governments and was easily played upon by suggestions of foreign conspiracy. This made the cry of papal hostility a useful one. There was no good evidence to be adduced as proof of the statements made against the papacy. Search was made for proof, but it was not found. The best argument on that line was one which started with evidence that Catholics owed obedience to the papal throne, then proved that the papal curia was an enemy of republicanism in Europe, and finally drew inference that the papacy must be an enemy of republicanism in America also. The obedience owed by American Catholics to the papacy was a matter of suspicion. The public did not yet fully understand the dual nature of the papacy as a civil and a spiritual power, and thought it only natural that a sovereign Pope should mix in politics wherever he had spiritual subjects. This agitation of nativism on the basis of papal enmity was a false issue covering up the real one, for the actual offence of the Catholic church was its non-conformity to American methods of church administration and popular education. These were the points upon which nativism attacked the church specifically. Keeping always at the front the idea of papal enmity, the theory of nativist attack was that of crippling the power that was inimical to America. It was argued that if church property could be wrested from priestly control, if religious and secular education could be entirely separated and if Catholic influence in politics could be broken down, then the power of

the Catholic priesthood would be less dangerous. It was the intention to force American methods upon the church system, making it conform to familiar models. The nativist attacks on the Roman church are most intelligible when interpreted as efforts to enforce conformity on points where church work is likely to touch politics.

In the matter of church administration the nativists wished to force lay trustees upon the church. The American idea of . popular control of public institutions had been carried into the workings of American religious bodies. In the earlier days of the American Catholic church the idea of lay trustees was voluntarily adopted, but later the clergy threw its influence against the idea and favored the episcopal control of church property. The effort of the nativists was to re-instate the lay trustees in power. Of course the theory of attack was that of limiting the power of the papacy in America, but the attack was really an effort to enforce conformity. Nativism did not fail in its effort entirely. Whether it was right or wrong in demanding the change as it did, is perhaps still open to debate. The question as to lay trustees still reappears occasionally as a problem in church administration. It is certain that the change demanded by nativism was not undesirable from an American standpoint. The only question is as to the propriety of insisting upon it.

In the matter of popular education the nativists steadily opposed the grant of public money to aid Catholic schools, and they opposed also the elimination of the Bible from public school exercises. The school controversy of 1840–42 in New York city brought a minute discussion of these problems in public education, but after all had been said, the question remained beclouded by the fact that neither side could agree with the other on the proper relationship of religious and secular education. The fact was that the Protestant American people had distanced the Catholics in evolution of education. By developing the Sunday-school system they were able to

separate secular from religious education without harming the latter. Catholics, meanwhile, were dependent upon the old parish-school system with its mingling of the religious and the secular. When, therefore, the Catholics demanded school moneys they were stopped by the reminder that only nonsectarian schools could profit by public aid. The nativist opposition to the Catholic views of school matters did not fail to plead as excuse the aggressiveness of the papacy. theless the whole question of school-money turned on conformity to American customs in education. Time has approved the nativist position on this point. The matter of Bible reading in the public schools became a feature of the school controversy when cited by Catholics as evidence that the public schools were not as wholly unsectarian as their friends claimed. Protestant churchmen denied that any use of the Bible could be sectarian, and on this contention nativism took the Protestant side. This question, too, has outlived political nativism and shows itself yet from time to time. would seem now, viewing the matter broadly, that nativism was wrong on this point. It is logical that separation of religious and secular work, if made at all, should be complete. In connection with school matters political nativism in New York never called for the abolition of church schools. Several Protestant denominations had their own schools, and no one questioned the right of Catholic schools to exist. It was only held that Catholic church schools, like the Protestant schools, should be self-supporting.

In the matter of political influence the nativists attacked the Catholic church by efforts to keep Catholics out of public office. Viewed as partisan policy this idea would have been proper enough, for a political movement must necessarily block the acquirement of office by its opponents wherever possible. Not satisfied with this reason, however, the nativists based their proscription upon the unproven charge of Catholic hostility toward American ideas, and here they placed them-

selves in the wrong. American opinion has never sincerely approved the application of religious tests for public office. It was right to vote down a Catholic candidate because he might favor objectionable issues, but it was wrong to vote him down for no reason except his religious affiliation. The nativist theory of this attack upon the church was again that of limiting the power of the papacy. Unlike other attacks, however, this was hardly an effort to secure conformity. It was more of a proscriptive measure which hid the feeling of race-antagonism that underlaid it. It was an excuse for discriminating at the polls against Irish office-seekers.

Altogether the nativist efforts against the Catholic church were very well calculated to diminish ecclesiastical power. Leaving out of the question the identity of the church against which the attacks were directed, this idea cannot be called un-American. Before the period of nativism there was a diminution of ecclesiastical power in the Protestant churches by influences within their lines. The nativists tried to effect the same end in the Catholic church by efforts from without. American opinion then and since has been persistent in viewing clerical bodies as unsafe guardians of the people's privileges. The trend of practice has been away from clerical control of church property, of popular education or of political work. The nativist desire to enforce conformity with American practice in this respect is not to be wholly condemned. The warfare of political nativism against the church was waged solely at those points where Catholic methods were opposed to the American social and political ideas. On purely religious matters political nativism never trespassed, although the fulminations of religious preachers and writers usually accompanied its activity. Catholic doctrines in religion were viewed with indifference by nativists at the same time that they gave closest attention to the church as a social organization. The line was, of course, indefinite between the church as a religious organization and the church as a social organiza.

tion. Catholic writers, as a rule, seem not to have been able to discriminate between the two conceptions, and they complained bitterly of the American inconsistency which talked of religious liberty, and yet warred against a church. In later years the same charge of inconsistency has been made in answer to attacks upon the Mormon church as a social organization controlling social customs. Nevertheless, despite all protests, American opinion discriminates between church organization as a means of grace and the same organization as a director of social law. The position has been practically held that minorities may not plead conscience as valid excuse for breaking with settled conditions of society. The war of nativism upon the Catholic organization was not after all inconsistent with the American understanding of religious liberty.

Nativism was opposed to the possession of political power by the foreign element without regard to the church affiliations of that element. In the larger cities of the country where the foreign-born population was considerable, the Irish and German people formed distinct social groups. Although they were hardly in touch with American ideas, were possessed of few responsibilities as citizens, and were the cause of unusual public expense, yet they were insistent upon political privileges. In most cities there were districts where the foreign element was in full control. In some cities the foreign vote could be so marshalled as to hold the balance of power between the parties. Under these circumstances the leaders of the foreign element received recognition by the political managers, and became party workers or office-holders. American-born citizens did not like the presence of foreign representatives in office. It was felt that these men would act according to the ideas and wishes of their foreign kindred, rather than according to those of the American community. Nativism, therefore, attacked the foreign element in its possession of political influence. As cause for its attack nativism alleged the danger that American customs would be crowded out by foreign ones if

foreigners secured control of the political machinery of the community. More especially it was declared that the un-American Catholic church would secure undue advantages from the rise of the foreign element in politics. This whole claim of danger to American ideas pre-supposed that the foreigners against whom the warning was uttered were persons unassimilated to American life. At the same time, however, nativism nominally arrayed itself against all the foreign-born whatever might be their social position. In theory it recognized no differences among foreign persons. Nativist theory in this respect was illogical, and nativism in action did not live up to its theory. Its grievances and its arguments on the question of foreign birth took their full meaning only when applied to the clannish foreign element. In political work, also, nativism easily joined hands with Americanized foreigners and viewed them with hearty friendship. It made no secret of the fact that its professed enmity for foreign birth was not wholly real. The real object of attack was the foreigner who sought to exercise political power over an American community with whose ideas he was not in sympathy. In its warfare against this class of the foreign-born, nativism endeavored to strip away such conditions as favored the encroachment of foreign ideas upon American custom. sought to reduce the foreign political influence to less dangerous proportions. This effort was directed upon three points, the decrease of the foreign vote, the reform of election abuses, and the barring of foreigners from office. set up the idea of a homogeneous body-politic as its end.

In the matter of decreasing the foreign vote the nativists advocated restriction of naturalization so far as voting was concerned. They were willing to concede civil rights to the foreign immigrant at an early date, but not the elective franchise. The reduction of the foreign vote was urged on the ground that foreign-born voters used the ballot without a knowledge of its effect and at the behest of leaders whose leadership was

in itself to be deplored. This reference to leaders was directed partly toward the mercenary politicians of the foreign quarters, but more largely toward the Catholic clergy, whose supposed connection with politics was always distasteful to Americans. The specific mode proposed for reducing the foreign vote was to require of foreigners twenty-one years of residence before voting. It was argued that this would correspond to the period of preparation for citizenship that was required of the native born, but the argument was fallacious and weak. The nativist idea of reducing the foreign vote has not been endorsed by American opinion of later years. nation has refused to believe that the foreign-born as a class are dangerous to national well-being, and it has condemned the test of birth to prove character of citizenship. The refusal of the franchise to all foreigners is deemed now to be an unfair mode of striking at clannishness, since it punishes the innocent with the guilty. Nevertheless, it is well to note that the principle of the thing is not unrelated to that of certain more recent legislation directed against Chinese and African blood to protect the dominant race.

In the matter of reforming election abuses, the nativists sought to secure order at the polls and to eliminate fraudulent votes. These reforms were urged on the ground that the foreign element profited by fraudulent increase of its voting power, that foreign bullies terrorized the native vote and that unnaturalized aliens took part in elections. It was proposed that the election bully be suppressed, and that illegal votes be barred out by an official registry of legal voters. In reality this attack on election abuses was impartial in its aims. It struck at fraud without inquiring as to the birth-place of the offenders. In point of fact, a considerable portion of the offenses against the franchise in the days of nativism were committed by native-born citizens, and the reforms asked by nativism were measures of good order and decency that applied to Public opinion has since approved the wishes of nativism in this direction.

In the matter of barring foreigners from office, the nativists pleaded the danger of giving power to men who would use it to aid the advance of foreign ideas. They took the ground that holders of public office must be thoroughly conversant with the wishes of the community over which they exercise authority. Here again the nativist complaint presupposed that the objectionable foreigners were unassimilated, and its error lay in the broadness of the dictum that all the foreignborn should be refused office. The nativist plan was to educate public opinion to vote down foreign-born candidates. Nativism did not advocate exclusion by statute, but only by popular action. The weakness of the plan was the evident unfairness of making nativity a test of privilege and punishing Americanized foreigners for the offences of the clannish element. It was proper, perhaps, to declare against office-holding by persons not in sympathy with American ways, but it was certainly wrong to insist that foreign birth was conclusive evidence of such lack of sympathy. Later years have not endorsed the nativist plan of refusing office on the score of foreign birth alone.

In one other way nativism sought to express opposition to the foreign element. It desired to prevent the immigration of paupers and criminals from Europe. On this point it was working more for social and economic than for political reform. The migration of the refuse of European society to America brought increased taxes and lower standards of social action. Nativism suggested a correction of the evil and its suggestion has in later years been fully approved.

The real character of American nativism is hardly to be estimated from the theories that it formulated as explanation of its efforts. Without a better key to its real nature it is difficult indeed to understand how this movement could take so tremendous a sweep of action as it did and yet possess as a basis so fallacious a set of arguments to justify it. It is possible, however, to understand it better than by a test

of its theories. Nativism in the great cities was primarily and above all things a phenomenon of racial antagonism. is the explanation of its inconsistent combination of strong action and weak excuse. Sometimes critics detected the real motive of the movement, but the platforms and official utterances of the nativists never cared to specify the feeling. It was because of this element of racial hostility that nativism could announce a sweeping program of exclusion of foreigners and Catholics from office and that it could obtain support for it, not only from Americans-born but from foreign-born citizens as well. It was because of its embodiment of racial hostility that nativism could concentrate upon the Catholic church, as a visible symbol of foreign clannishness, the enmity and hatred of a public which boasted of its religious tolerance. It was for the same reason that the offences of foreigners against the franchise were met by an indignation which had never been called forth against native-born offenders. Such was the real character of nativism in the great cities where the foreign element was large. Outside of the cities its character was somewhat different. In the rural districts there were no masses of foreign population clannishly asserting themselves in defiance of American ways. The nativist political movement in national and state affairs was a sham and a pretext. The nation as a whole was never nativist in feeling. Probably no one state, as a whole, was ever genuinely worried over the existence of the foreign element. In state and national campaigns nativism was a politicians' movement rather than a popular one. issues were convenient for use at some particular crisis and for a time were accepted and advocated on that account. the country districts, however, nativism had no enduring basis in general public sentiment. These facts explain the marvelous rise and the no less marvelous collapse of nativism in its national organization. It was a mere device of politics.

Was nativism justifiable? It was a truth that the foreign people who were crossing the Atlantic by thousands were



bringing with them and perpetuating ideas and conditions that were inharmonious with those evolved by two centuries of American society. Foreign conditions of lawlessness, poverty and immorality were apparent. Foreign ideas of the relation of the individual to society, of the relation of church and state, of the use of public office and political opportunity, of the proper sphere of clerical influence, were seen to be different from those of Americans. Foreign lawlessness and poverty were temporary and would probably yield to the pressure of better environment, but foreign ideas as to church, state and society seemed persistent and even aggressive. Therefore nativism took its stand in opposition. It demanded that the new people should take up the ideas of American society. asked of them good conduct in politics, submissiveness to law, separation of church from politics, adoption of unsectarian education, rejection of clerical control and abandonment of foreign customs and sympathies. In short, nativism demanded that the new people lose their social identity and aid their own absorption into American society. Whether or not these demands were extreme must be a matter of opinion. Popular instinct seems, however, to favor the idea of a homogeneous society. Nativism strove to create a homogeneous electorate with the idea that a homogeneous society would follow. attack upon the Catholic church was an effort to weaken the support of foreign society. The Catholic church itself was not untouched by nativism, though a hint of the fact at one time by a Catholic writer brought down a storm upon him. In the main the church was foreign in personnel, ideas and methods, and its attitude invited attack. Whether or not nativism was justified depends, therefore, on the right of immigrants to bring new ways to American society. The American argument supposed that republican America was more advanced in its social structure than Europe, and that the adoption of European ideas meant social retrogression. Americans had no protest

1 Brownson's Review, 1854.

to make against European culture and experience, but only against European ideas of the position of the individual in society. If the American faith in itself was wrong, then perhaps the whole attitude of nativism was also wrong.

What results had nativist effort? As barren of success as the work of nativism seems when it is looked back upon, it yet was not resultless. It brought about a thorough discussion of the attitude to be taken by the American people toward the immigrants from foreign lands. In the earlier years of the Republic the nation took the position of undiscriminating welcome to all, preaching that individual liberty was a right of residence. It was the abuse of that liberty and the opposition of the foreign-born to American ideas that brought a re-examination of old theories and an attempted reshaping of policy. It is rash, perhaps, to try to formulate the "views" of a great nation, but so far as American opinion can be judged it seems to have decided this.—that foreign ideas may be followed by foreigners resident in America, but those ideas must not attempt any career of conquest in American society. Social clannishness, ecclesiastical domination and race combinations in politics exist by sufferance, but they are emphatically non-American ideas to be reprobated on broad grounds for public policy. This opinion is the contribution of nativism to the evolution of American democratic ideals.

SOURCES

In the American political system the political party is an organization almost entirely extra-legal in character. It is seldom recognized by the public records of the community. In the study of a partisan movement, therefore, the ordinary sources for political history very largely fail. The story must be made up from the records of the organization itself, if any exist, from the private papers of men who directed its work and from the newspaper files which chronicled its various moves in the never-ending game of politics. The nativist political organizations had records of their own in their day of activity. There were, presumably, minutes of the sessions of its state committees and state conventions, of its local executive committees and party conventions in the localities where it existed. There were certainly, during a part of the nativist period, records of the secret bodies of one sort or another in which the voters and adherents of the movement were organized. Of these two sorts of records very little seems to be now extant. The writer has found no manuscript record whatever of committee or convention, and but small material for the secret system. The great Know-Nothing Order has left hardly a trace of itself in the way of records. Many of its official documents were re-printed by the daily press at the time they were issued, and these have been valuable aids in work. but as to manuscript material the writer has found nothing. The records of the Know-Nothing Grand Council are presumed to have passed from one grand secretary to another till the Grand Council ended; but the late Hon. James W. Husted, who was the last regular secretary of the state organi-453] 255

zation, left no material of the sort among his private papers at the time of his death, and the real fate of the Grand Council records can only be guessed. The records of the State Chancery of the Order of United Americans are known to have been burned by the last grand secretary after the Order had gone to pieces. The records of the Executive Convention and grand executive committee of the United Americans were more fortunate in their fate, and fell into the hands of the last grand sachem of the Order, Mr. Charles E. Gildersleeve, now of New York city, in whose possession they yet remain. The same gentleman has the records of two of the subordinate chapters of the Order.

The paucity of actual records of executive work on the part of the nativists has been partly relieved by the existence of collections of documents bearing indirectly upon the subject. The writer has had access to the collection of Mr. Gildersleeve, which includes, besides the records above-named, a mass of miscellaneous material bearing upon the history of the United Americans. He has also been favored by access to the collection of Mr. Henry Baldwin, of New Haven, Conn., in which there is considerable material relating to the early American Republican movement, as well as matter relating to the United Americans. The private papers of James W. Barker, the Know-Nothing leader, were in private hands at Louisville, Ky., some years ago and were known to include documents relating to the Know-Nothing movement, but their present location is uncertain. The private papers of Hon. Erastus Brooks, the later leader of the American Party, are in the hands of the family in New York city. Inquiry as to these elicits the fact that they contain no material which cannot be obtained from the newspaper files of the time.

The use of public records in this work has been small. The printed journals of Congress and of the New York legislature have been useful aids in following the course of nativist attempts at law-making. The same is true of the

printed proceedings of the common council of New York city. Within the pages of these records can also be traced the appearance of those petitions which usually mark the rise of popular interest in any particular topic. Another class of public records which are of especial importance in the study of parties is that of official canvasses of votes, for it is by the popular support of its tickets that the strength of any political organization must be judged. The local canvasses of New York city previous to 1854 are not known to be extant as public records and their figures have to be supplied from the daily press. In 1854 and afterward the official canvasses were usually published in full by the city, and can be readily found in newspaper files. The figures of the official canvasses are also given by Valentine's manuals of the corporation of the city of New York, but these are not always reliable. The official canvasses of the state in 1854 and after were usually published by the New York press in full text.

So far as secondary authorities are concerned there is little information to be gathered on the subject of nativist political effort, although there is a wealth of printed material on the principles and grievances of nativism. The earlier nativist movement of 1843-47 did not become strong enough to call out any extended history of its work, while the later movements of the Know-Nothing period remained almost unchronicled because of its secret character, which forbade publication of details. Only two works, those of Whitney and of Carroll, make any useful reference to the Know-Nothing society. The following books have been used in the preparation of this work:

"An American." Imminent Dangers to the Free Institutions of the United States through Foreign Immigration. New York, 1835. N. Y. Hist. Soc. Library.

Carroll, Anna Ella. The Great American Battle, or the Contest between Christianity and Political Romanism. New York, Auburn, 1856. Columbia University Library.

Kehoe, Lawrence, editor. Complete Works of the Most Rev. John Hughes

D. D., Archbishop of New York. 2 vols. New York, 1866. N. Y. Public Library, Astor Branch.

Lee, John Hancock. The Origin and Progress of the American Farty in Politics. Philadelphia, 1855. Columbia University Library.

Morse, Samuel F. B. Foreign Conspiracy against the Liberties of the United States. Seventh edition. New York, 1852. Columbia University Library.

Orr, Hector. The Native American, a Gift for the People. Philadelphia, 1845. Columbia University Library.

Shea, John Gilmary. History of the Catholic Church in the United States. New York, 1888, 1890. Columbia University Library.

Smith, Thomas E. V. Political Parties and Their Places of Meeting in New York City. New York, 1893. N. Y. Hist. Soc. Library.

Smith, William C. Pillars in the Temple, or Sketches of Deceased Laymen of the Methodist Episcopal Church. New York, 1872. Private copy.

Tisdale, W. S., compiler. The Controversy Between Senator Brooks and "4 John," Archbishop of New York. New York [1855]. N. Y. Public Library Astor Brauch.

Whitney, Thomas R. A Defense of the American Policy as Opposed to the Encroachments of Foreign Influence. New York [1856]. Columbia University Library.

By far the greater part of the material here used has been gleaned from the newspaper files of the period in which nativism essayed its political role. In this line of research, also, there have been difficulties. In the earlier period of nativism, when it was an open movement, the daily press was not accustomed to chronicle political news with any fullness. In the later period of nativism, when it was a secret movement, the daily press was disposed to say much, but had not the facts to tell. In every period when nativism was active there were newspapers devoted to its service with varying degrees of heartiness, but those which were most typically and completely nativist in sentiment were usually short-lived, disappearing with the movement on which they were founded. Of those papers and magazines of New York state which were friendly to nativism, and which might be styled the mouth-pieces of the movement, few are known to exist in files to-day. The lack of such files is not a serious matter, however, for the columns of those which fought nativism are fully as useful for purposes of research, providing that proper allowance be made for the natural bias of the papers. In the preparation of this work the following files have been used:

The Albany Argus, 1842-45, 1854. Cornell University Library.

The American (Poughkeepsie), 1845-46. Baldwin Collection, New Haven, Conp.

Evening Gazette, 1845-46, continued as Gazette and Times, 1846-47. N. Y. Hist. Soc. Library.

Evening Mirror, 1847, 1853. N. Y. Hist. Soc. Library.

Morning Courier and New York Enquirer, 1835-36, 1844-45, 1854-55. N. Y. Public Library, Astor Branch. N. Y. Hist. Soc. Library.

New York American, 1835-37, 1841. N. Y. Hist. Soc. Library.

New York Citizen and American Republican, 1844, continued as New York American Republican, 1844. N. Y. Hist. Soc. Library.

New York Commercial Advertiser, 1836-37, 1841-42, 1853. N. Y. Hist. Soc. Library.

New Yorker, 1837-40. N. Y. Public Library, Astor Branch.

New York Evening Post, 1835-36, 1841, 1845, 1852-54. N. Y. Public Library, Astor Branch.

New York Herald, 1836-60. N. Y. Public Library, Astor and Lenox Branches. N. Y. Hist. Soc. Library.

New York Journal of Commerce, 1841-45, 1853. N. Y. Society Library. N. Y. Public Library, Astor Branch.

New York Observer, 1836, 1840-43. N. Y. Hist. Soc. Library.

New York Times, 1852-57. N. Y. Public Library, Astor Branch.

New York Tribune, 1841-46, 1853-60. N. Y. Hist. Soc. Library. N. Y. Public Library, Astor Branch.

The O. U. A., 1848-49. N. Y. Hist. Soc. Library.

The Plebeian, 1844. N. Y. Society Library.

The Republic, 1851-52. N. Y. Public Library, Astor Branch.

Rochester Daily American, 1844-45. N. Y. Hist. Soc. Library.

The Sun, 1843. Office Sun Publishing Company.

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THE

RECONSTRUCTION OF GEORGIA

EDWIN C. WOOLLEY, Ph.D.



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LIST OF ABBREVIATIONS

- A. A. C. = American Annual Cyclopaedia.
- B. A. = Address of Bullock to the people of Georgia, a pamphlet dated 1872.
- B. L. = Letter from Bullock to the chairman of the Ku Klux Committee, published in Atlanta in 1871.
 - C. G. = Congressional Globe.
 - C. R. Report of the State Comptroller.
 - E. D. = United States Executive Documents.
 - E. M. = Executive Minutes (of Georgia).
 - G. O. D. S. = General Orders issued in the Department of the South.
 - G.O. H. = General Orders issued from the headquarters of the army.
 - G. O. M. D. G. = General Orders issued in the Military District of Georgia.
 - G. O. T. M. D. = General Orders issued in the Third Military District.
 - H. J. = Journal of the Georgia House of Representatives.
 - H. M. D. = United States House Miscellaneous Documents.
 - J. C., 1865 = Journal of the Georgia Constitutional Convention of 1865.
 - J. C., 1867-8 = Journal of the Georgia Constitutional Convention of 1867-8.
- K. K. R. = Ku Klux Report (Report of the Joint Committee of Congress on the Conditions in the Late Insurrectionary States, submitted at the 2d session of the 42d Congress, 1872).
 - M. C. U. = Milledgeville Confederate Union.
 - M. F. U. = Milledgeville Federal Union.
 - R. C. = Reports of Committees of the United States House of Representatives.
 - R. S. W. = Report of the Secretary of War.
 - S. D. = United States Senate Documents.
 - S. J. = Journal of the Georgia Senate.
 - S. L. = Session Laws of Georgia.
 - S. R. = United States Senate Reports.
 - S. O. M. D. G. = Special Orders issued in the Military District of Georgia.
 - S. O. T. M. D. = Special Orders issued in the Third Military District.
 - U. S. L. = United States Statutes at Large.

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CHAPTER I

PRESIDENTIAL RECONSTRUCTION

THE question, what political disposition should be made of the Confederate States after the destruction of their military power, began to be prominent in public discussion in December, 1863. It was then that President Lincoln announced his policy upon the subject, which was to restore each state to its former position in the Union as soon as one-tenth of its population had taken the oath of allegiance prescribed in his amnesty proclamation and had organized a state government pledged to abolish slavery. This policy Lincoln applied to those states which were subdued by the federal forces during his administration, viz., Tennessee, Arkansas and Louisiana. When the remaining states of the Confederacy surrendered in 1865, President Johnson applied the same policy, with some modifications, to each of them (except Virginia, where he simply recognized the Pierpont government).

Before this policy was put into operation, however, an effort was made by some of the leaders of the Confederacy to secure the restoration of those states to the Union without the reconstruction and the pledge required by the President. After the surrender of Lee's army (April 9, 1865), General J. E. Johnston, acting under the authority of Jefferson Davis and with the advice of Breckenridge, the Confederate Secretary of War, and Reagan, the Confederate Postmaster General, proposed to General Sherman the surrender of all the Confederate armies then in existence on certain condi-

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tions. Among these was the condition that the executive of the United States should recognize the lately hostile state governments upon the renewal by their officers of their oath of allegiance to the federal Constitution, and that the people of the states so recognized should be guaranteed, so far as this lay in the power of the executive, their political rights as defined by the federal Constitution. Sherman signed a convention with Johnston agreeing to these terms, on April 18. That he intended by the agreement to commit the federal government to any permanent policy is doubtful. But when the convention was communicated for ratification to his superiors at headquarters, they showed the most decided opposition to granting the terms proposed even temporarily. The convention was emphatically disavowed, and on April 26 Sherman had to content himself with the surrender of Johnston's army only, agreed to on purely military terms.1

Georgia formed a part of the district under the command of General Johnston. As soon, therefore, as the news of the surrender could reach that state, hostilities there ceased. On May 3, Governor Brown issued a summons for a meeting of the state legislature to take place on May 22, in order that measures might be taken "to prevent anarchy, restore and preserve order, and save what [could be saved] of liberty and civilization." At a time of general consternation, when military operations had displaced local government and closed the courts in many places, when the whole population was in want 3 through the devastation of the war or through the collapse of the Confederate currency which

¹ Alex. Stephens, The War Between the States, vol. ii, p. 623; W. T. Sherman, Memoirs, vol. ii, pp. 346-362.

² M. C. U., May 9, 1865.

⁸ See the account of the gigantic relief operations of the federal army, A. A. C., 1865, p. 392.

followed the collapse of the Confederate army, the need of such measures was apparent.

The calling of the legislature incurred the disapproval of the federal authorities for two reasons. First, they regarded it as an attempt to prepare for further hostilities, and they accordingly arrested Brown, carried him to Washington, and put him in prison.² Second, in any case, as the disavowal of the convention of April 18 had shown, they did not intend to allow the state governments of the South to resume their regular activities at once, and accordingly the commander of the Department of the South issued orders on May 15, declaring void the proclamation of Joseph E. Brown, "styling himself Governor of Georgia," and forbidding obedience thereto.³

The federal army now took control of the entire state government. Detachments were stationed in all the principal towns and county seats, and the commanders sometimes removed the civil officers and appointed others, sometimes allowed them to remain, subject to their direction. Military orders were issued regarding a wide range of civil affairs, such as school administration, sanitary provisions, the regulation of trade, the fixing of prices at which commodities should be sold, etc.⁴ The provost marshal's courts were fur-

¹ M. C. U., May 9, 1865.

² Letter from Joseph E. Brown to Andrew Johnson, dated May 20, 1865, in the Department of War, Washington. Brown was arrested on May 10. On May 8, upon surrendering the state troops to the federal general Wilson, he had been paroled. (The parole paper is in the above mentioned archives.) Hence the arrest was a violation of his parole. When Wilson entered into the parole engagement he had not been informed how his superiors would regard the summon, ing of the legislature. Immediately afterward he probably received orders from the central authorities to arrest Brown. He preferred obeying orders to observing his engagement.

⁸G. O. D. S., 1865, no. 63.

⁴ See G. O. D. S., 1865, passim. Also Savannah Republican, May 1, 2, 3, etc. 1865.

ther useful, to some extent, as substitutes for the state courts, whose operations were largely interrupted.¹ Directions to the officers of the Department admonished them that "the military authority should sustain, not assume the functions of, civil authority," except when the latter course was necessary to preserve the peace.² This admonition from headquarters, issued after the President's plan for reinstating Georgia in the Union had been put into operation, reflects his desire for a quick restoration of normal government.

President Johnson announced his policy toward the seceded states in his proclamation of May 29, 1865, regarding North Carolina. By it a provisional governor was appointed for that state, with the duty of making the necessary arrangements for the meeting of a consitutional convention, to be composed of and elected by men who had taken the oath of allegiance prescribed by the President's amnesty proclamation of the same date, and who were qualified voters according to the laws of the state in force before the war. The proclamation did not state what the President would require of the conventton, but we may mention by way of anticipation that his requirements were the revocation of the ordinance of secession, the construction of a new state government in place of the rebel government, the repudiaation of the rebel debt, and the abolition of slavery within the state. The provisional governor was further authorized to do whatever was "necessary and proper to enable [the] loyal people of the state of North Carolina to restore said state to its constitutional relations to the federal government."3

¹ Savannah *Republican*, July 4, 1865. See also James Johnson's proclamation of July 13, 1865, M. F. U. of same date.

³ M. F. U., July 25, 1865.

⁸ U. S. L., vol. 13, 760. The provisional governorship, it may be remarked,

For each of the states subdued in 1865, except Virginia, a provisional governor was appointed by a similar proclama-On June 17, James Johnson, a citizen of Georgia, was appointed to the position in that state. On July 13th, he issued a proclamation providing for the election of the convention. Delegates were distributed on the basis of the legislature of 1860; the first Wednesday in October was set for the election, and the fourth Wednesday in the same month for the meeting of the convention.2 Next, the provisional governor undertook the task of securing popular support to the programme of restoration. To encourage subscription to the amnesty oath (a prerequisite to voting for delegates to the convention) he removed the disagreeable necessity of taking it before the military authorities by directing the ordinary and the clerk of the Superior Court of each county to administer it,3 He made many speeches throughout the state urging the citizens to take the amnesty oath, to enter earnestly into the election of the convention, and to submit quietly to the conditions imposed by the President.

His efforts were very successful. This was partly due to the place he held in public estimation. He was a lawyer widely known and universally respected. It was also partly due to the attitude of Governor Brown. Brown, after a confinement of several weeks in prison at Washington, secured an interview with President Johnson, and satisfied the President that his object in calling the legislature was simply public relief, that he had no intention to prolong the war, but

was characterized by the Secretary of War as "ancillary to the withdrawal of military force, the disbandment of armies, and the reduction of military expenditure by provisional [civil organizations] to take the place of armed force." The salaries of the provisional governors were paid from the army contingencies fund. See S. D., 30th Congress, 1st session, no. 26.

¹ U. S. L., vol. 13, p. 764.

² M. F. U., July 13, 1865; A. A. C., 1865, p. 394.

⁸ M. F. U., August 15, 1865; A. A. C., loc. cit.

calmly submitted to the fact that his side was defeated." This explanation and the spirit displayed were so satisfactory to Johnson that Brown was released, and permitted to return to Georgia. His return, remarked Johnson, "can be turned to good account. He will at once go to work and do all he can in restoring the state." 2 This prediction proved The war governor of Georgia became the type of those Secessionists who practised and counseled quiet acceptance of the terms imposed by the conqueror, as the most sensible and advantageous course. On June 29th he issued an address to the people of Georgia, resigning the governorship, and advising acquiescence in the abolition of slavery and active participation in the reorganization of the state government according to the President's wishes.3 The assumption of this attitude by Brown grieved and offended some of his fellow Secessionists. But the majority shared his opinion. The provisional governor was welcomed, and and his speeches approved on all sides.4 The result was that the convention which met on October 25th was a body distinguished for the reputation and ability of its members.

The convention was called to order by the provisional governor, and chose as permanent chairman Herschel V. Johnson.⁵ Then a message from the provisional governor was read, suggesting certain measures of finance and other state business requiring immediate action, suggesting also certain alterations in the state judiciary, but especially pointing out the chief objects of the convention, viz., the passage of those acts requisite for the restoration of the

¹ Letter from Brown to Johnson, dated May 20, 1865, archives of the Department of War, Washington.

² Letter from Johnson to Stanton dated June 3, 1865, in same archives.

² M. F. U., July 11, 1865.

⁴ M. F. U., July 18. Savannah Republican, July 1 and 3.

⁶ J. C., 1865, p. 3.

state.¹ These measures the convention quickly proceeded to pass. On October 26th it repealed the ordinance of secession and the ordinance ratifying the Confederate constitution.; by paragraph 20 of article I. of the new constitution it abolished slavery in the state; and on November 8th, the last day of the session, it declared the state debt contracted to aid the Confederacy void. The convention provided for a general state election on the following November 15th, and to expedite complete restoration, anticipated the regular work of the legislature by creating congressional districts, in order that Georgia's representatives might be chosen at that election.

One thing now remained to be done before the President would withdraw federal power and leave the state to its own government, viz., ratification of the Thirteenth Amendment. The legislature elected on November 15th assembled on December 4th.⁵ The provisional governor, according to the President's directions,⁶ laid the Thirteenth Amendment before it. The Amendment was ratified on December 9th.⁷ After this the provisional governor was relieved, the governor elect was inaugurated (December 14th), and the President sent a courteous message of recognition to the latter.⁸

Thus the President, having reconstructed the state government, had restored Georgia to statehood so far as its internal government was concerned. There remained only the admission of its representatives to Congress to complete the restoration.

⁸ M. F. U., December 19 and 26, 1865.

¹ J. C., 1865, p. 8.
¹ *Ibid.*, pp. 17, 18.

³ Ibid., p. 234. The ordinance to this effect was passed only after a hard fight, and after a telegraphic warning from the President that if it failed the state would fail of restoration. See S. D., 39th Congress, 1st session, no. 26, p. 81.

⁴ J. C., 1865, pp. 18 and 28.
⁵ S. J., 1865-6, p. 3.

⁶S. D., 39th Congress, 1st session, no. 26, p. 95.

⁷S. L., 1865, p. 313.

CHAPTER II

THE JOHNSON GOVERNMENT

FROM the conduct of the state governments formed in Georgia and the other southern states under the direction of President Johnson, the public opinion of the North drew conclusions regarding three things; the disposition of the people represented by those governments toward the emancipated slaves, their attitude toward the cause for which they had fought, and their feeling toward the power which had subdued them. This chapter treats the Johnson government of Georgia from the same points of view.

Whatever may have been the prevailing disposition of the white people toward the slaves while slavery flourished, shortly before the close of the war that disposition was characterized by benevolence and gratitude. In spite of the opportunities of escape, and of plunder and other violence, offered by the times, the slaves had acted with singular faithfulness and devotion. The gratitude of their masters even went so far as to propose plans for the general education of the negroes.

The close of the war and the advent of emancipation produced a change in the conduct of the negroes, which in time produced a change in the attitude of the white people. The negroes, from the talk which they heard and did not understand, and from their ignorant imaginations, conceived strange ideas of emancipation. They supposed it meant

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¹ See Jenkins' message to the legislature, M. F. U., December 19, 1865.

² K. K. R., vol. 6, p. 320 (testimony of John B. Gordon).

governmental bounty, idleness, and wealth. They abandoned their work, wandered about the country, collected in towns -in short, manifested a general restlessness and demoralization. This caused alarm and apprehension among the white people. There were other causes of friction between Many negroes, on discovering that they were the two races. free, assumed what are known as "airs;" and then as now, among things intolerable to a southern white man a "sassy nigger" held a curious pre-eminence. The airs of the negro and the wrath of the white man were both augmented by officious members of the Freedmen's Bureau. Moreover. because the negroes had gained by the humiliation of the South, they received a share of the venom of defeat. other element of discord was furnished by a particular part of the white population, the so-called poor whites. These saw in the new protigis of the United States not only a rival laboring class, but a menace to their social position, and hence assumed an attitude of jealousy and hatred. were the conditions favorable to social disturbance which followed emancipation. In the latter part of 1865 they had already begun to produce their natural result, Violent encounters between negroes and white men (in which the latter were almost always the aggressors) were noticeably frequent.1

To this social demoralization was added economic distress and perplexity. The devastation of the war had fallen with especial severity upon Georgia. Worse still, the people seemed unable to repair the damage or to return to productive activity. Planters seemed unable to adapt themselves to the new economic conditions. Slavery, the system which they understood, was gone; they used the new system with little success, all the less because of the restlessness of the negroes.

¹ Report of Carl Schurz on conditions in the South, made in December, 1865. S. D., 39th Congress, 2d session, no. 2.

Such were the conditions and dangers with which the Johnson government had to deal as it best could. It was believed by northern statesmen that the situation would be mastered by enfranchising the negroes and investing them with a citizenship exactly equal to that of white persons.1 The Georgia constitution of 1865 made it clear that the Georgia law-makers were not disciples of that school. That constitution confined the electoral franchise to "free white male citizens." It ordered the legislature at its first session "to provide by law for the government of free persons of color," for "guarding them and the state against any evil that may arise from their sudden emancipation," and "for the regulation of their transactions with citizens;" also "to create county courts with jurisdiction in criminal cases excepted from the exclusive jurisdiction of the Superior [county] Court, and in civil cases whereto free persons of color may be parties," and to make rules "prescribing in what cases their testimony shall be admitted in the courts."3

The legislation enacted in 1866 in the interest of the public peace and order consisted of—

I. An apprentice law. By this it was made the duty of the judges of the county courts to bind out minors whose parents were dead or unable to support them as apprentices until the age of twenty-one. A master receiving an apprentice under this law was to teach him a trade, furnish him food, clothes, and medicine, teach him habits of industry, honesty, and morality, teach him to read the English language, and govern him with humanity. On default of any of these requirements a master was to be fined. The judge having charge of this law might, on application from an apprentice or an apprentice's friend, dissolve the contract

¹ Report of Carl Schurz on conditions in the South, made in December, 1863. S. D., 39th Congress, 2d session, no. 2.

¹ Art. v, sect. I, § I.

on account of cruelty on the part of the master. An apprentice at the end of his term was entitled to an allowance from the master "with which to begin life." The amount was left to the master's generosity, but if he offered less than \$100 the apprentice might complain to the court, which should then fix the amount.

- 2. A vagrancy law. Vagrancy was defined in the usual language of our criminal codes. The penalty was heavier than these usually provide, because the need of suppressing the vice was more urgent than usual. A vagrant might be fined or imprisoned at the discretion of the court, or sentenced to labor on the public works for not more than one year; or he might, at the discretion of the court "be bound out to some person for a time not more than one year, upon such valuable consideration as the court may prescribe." ²
- 3. Alterations in the penal laws. These alterations were of two contrasting kinds. The penalty for burglary in the night, arson, horse stealing and rape was changed from long imprisonment of to death, which, however, might be in every case commuted to life imprisonment. On the other hand, several hundred crimes, including all the species of larceny except that mentioned above, were reduced from felonies to misdemeanors, and the penalties from imprisonment in the penitentiary to fine, imprisonment in the county jail, or whipping, at the discretion of the court. This mitigation of punishment was made in consideration of the negroes' ignorance of the nature of their offences, due to the fact that these had before been punished by their masters and not by

¹ S. L., 1865-66, p. 6.
² S. L., 1865-66, p. 234.

⁸ Before, the maximum penalty for rape, arson, and burglary in the night had been imprisonment for 20 years, and for horse stealing imprisonment for 5 years

⁴S. L., 1865–66, p. 232; 1866, p. 151.

⁵ Ibid., 1866, p. 150.

⁶ Ibid., 1865-66, p. 233.

the law. Probably the capacity of the penitentiary was also considered.

To facilitate the transition from the old labor system to the new by remedying in some degree the instability of the labor supply, the legislature made it a crime to employ any servant during the term for which he had contracted to work for another, or to induce a servant to quit the service of an employer before the close of the period contracted for.¹

Regarding the civil rights and relations of the negroes the following legislation was passed:

1. A law in these words:

That persons of color shall have the right to make and enforce contracts; to sue, be sued; to be parties and give evidence; to inherit; to purchase, lease, sell, hold and convey real and personal property; and to have full and equal benefit of all laws and proceedings for the security of person and estate; and shall not be subject to any other or different punishment, pain or penalty for the commission of any act or offence than such as are prescribed for white persons committing like acts or offences.²

- 2. A provision, implied in the law above quoted, that negroes were to be held competent witnesses in all courts in cases, civil or criminal, whereto persons of color should be parties.³
- 3. Certain provisions for establishing among the negroes the regular relations between husband and wife, parent and child, in place of the irregular relations which had prevailed under slavery.⁴
- 4. The prohibition of marriage between negroes and white persons.⁵

This last provision, and also the exclusion of the testimony of negroes from cases whereto a colored person was not party, are of social rather than legal importance, since their effect was to separate the two races, but not to deprive the negroes of the equal protection and benefit of the law. They

were like the school law, which provided that only "free white inhabitants of the state" were entitled to instruction in the public schools.²

The Johnson government thus assigned to the negroes a position of political incapacity, social inferiority, but equality of civil rights. This plan was very remote from that in favor in the North, but it is not thereby condemned. As to the measures of the Johnson government for remedying industrial distress and guarding against social dangers, we search them in vain for the inhuman harshness to the negroes which they were reputed to embody. This legislation of Georgia was more favorable to the negroes than that of the other Johnson governments. But the North looked at the conquered South as a whole, and if the difference of the laws of Georgia from those of other states was noticed, it was quickly forgotten. To northern public opinion the scheme for the treatment of the negroes embodied in the Georgia laws, even if its mildness had been recognized, would have been a cause of indignation. This was the consummate hour of a humanitarian enthusiasm sprung from forty years of anti-slavery agitation, and now intensified by the passions of the war. In such an hour a plan which frankly denied to the negroes political and social equality was looked upon as an offence against justice and humanity. The Georgia law-makers had sought for a plan to meet immediate necessities, not a plan for the elevation of the black race. To demand that Georgia, stricken and menaced as she was, should pass by the needs of the present and enter upon a vague scheme of philanthropy, was unreasonable. was just as unreasonable to conclude from the course which Georgia took, that the black race in Georgia would be forever held down, or that positive encouragement would be

1 S. L., 1866, p. 59.

withheld as time went on. Nevertheless the public opinion of the North made this demand and drew these conclusions.

Having stated the attitude of the Johnson government to the emancipated slave, we next come to its attitude toward the fallen Confederacy and toward the federal government. And with reference to this subject the following facts are to be noticed:

- 1. Almost the first act of the constitutional convention was to vote a memorial to the President in behalf of Jefferson Davis.
- 2. The convention, instead of declaring that the ordinance of secession was an act of illegality and error, and was null and void, laconically declared it "repealed." ²
- 3. The convention anticipated the function of the legislature in order to provide pensions for the wounded Confederate soldiers and for widows of the dead.³

Through the legislature Georgia showed herself equally frank in expressing affection and regret for the lost cause, and equally wanting in an attitude of humility to the federal government—or at least to the dominant party in Congress. On the recommendation of the governor she rejected the Fourteenth Amendment by an almost unanimous vote, largely because of the disabilities it imposed on the leaders of the Confederacy, Instead of remaining a humbly silent spectator of the controversy between the President and Congress, she boldly thanked the President for his "regard for the constitutional rights of states," and for "the determined will that says to a still hostile faction of her recent foes, 'Thus far shalt thou go and no farther. Peace, be still.'"

¹ J. C., 1865, p. 16. ² Ibid., p. 17. ⁸ Ibid., 137.

⁴S. L., 1866, p. 216. For the governor's message and the report of the committee to which the amendment was referred, see A. A. C., 1865, p. 352. For a further expression of public opinion, see Atlanta *New Era*, October 19, 1866.

⁶ S. L., 1865-66, p. 315.

She continued to provide for the unfortunate champions of the Confederacy, characterizing this action as "a holy and patriotic duty." She extended expressions of "sincerest condolence and warmest sympathy" to the illustrious state prisoner, Jefferson Davis, declaring that her "warmest affections cluster[ed] around the fallen chief of a once dear but now abandoned cause." 2

These acts and resolutions expressed through the government the spirit which was found among the people by direct observers—a spirit of submission to irresistible force, in some cases sullen, in most cases unrepentant.³ At that time the absence of that spirit would have been extraordinary. But the public opinion of the North regarded it not as the aftermath of war, which would soon pass, but as a spirit which, if left undisciplined, would break out in another war.

This belief, and the belief that the negroes were destined by the southern governments to suffer injustice and debasement, and that the ballot was their only salvation, gave rise to two corresponding purposes—to chasten the rebellious spirit of the South, and to invest the negroes with the voting franchise by force. To destroy the state governments of the South and rebuild them on a basis of negro suffrage would accomplish both these purposes. This plan was also supported for the sake of a third purpose, viz., to secure for the Republican party the votes of the negroes. There were thus three classes of men bent on abolishing the Johnson government. We may call them the Disciplinarians, the Humanitarians, and the Republican Politicians.

¹S. L., 1865-66, p. 14, and S. L., 1866, p. 143.

²S. L., 1866, p. 219. ⁸ Report of Carl Schurz above cited.

CHAPTER III

CONGRESSIONAL DELIBERATIONS AND ACTIONS CONCERN-ING THE JOHNSON GOVERNMENTS, ENDING IN THE RECONSTRUCTION ACTS OF 1867

WHEN Congress met on December 4, 1865, President Johnson informed it of the measures he had taken for restoring the southern states and of the conditions he had required as necessary to restoration. He emphasized the requirement that the Thirteenth Amendment be ratified (which, as stated in Chapter I, was complied with in Georgia five days later).

It is not too much to ask [he said], in the name of the whole people, that, on the one side, the plan of restoration shall proceed in conformity with a willingness to cast the disorders of the past into oblivion; and that, on the other, the evidence of sincerity in the future maintenance of the Union shall be put beyond any doubt by the ratification of the proposed amendment. . . . The amendment to the Constitution being adopted, it would remain for the states . . . to resume their places in the two branches of the national legislature.

That Congress was not entirely pleased with the President's course; that it did not agree with him considering the adoption of the Thirteenth Amendment, the most that could be asked of the southern states, and that it did not intend to give effect to his last suggestion, soon became apparent. In the Senate, on the day on which the President's message was read, Sumner offered resolutions to the effect that before the southern states should be admitted to representation in Congress they must enfranchise "all citizens," establish systems of education open to negroes equally

¹C. G., 39th Congress, 1st session. Appendix, p. 1.

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with white people, and choose loyal persons for state and national offices.* The resolutions concluded: "That the states cannot be precipitated back to political power and independence, but they must wait until these conditions are in all respects fulfilled."*

The House of Representatives, after organizing, immediately proposed to the Senate a joint committee to "inquire into the condition of the states which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either house of Congress." The Senate accepted the proposal, and on December 13 the committee was formed.³

Five months passed before the committee reported. During that interval Congress took no action determining the question at issue. A vast number of bills and resolutions was introduced proposing various modes of treatment for the southern states and various theories regarding their status, which are interesting to the historian, but all of which fell by the way. The Freedmen's Bureau Bill, if it had become law during this period, would have implied that in the opinion of Congress the late Confederate States were simply territory of the United States and not states in the Union. 4 But this bill failed to be repassed over the President's veto.5 The Civil Rights Bill, which became law on April 9, 1866, made it a crime to discriminate against any person on account of his race or color under the alleged authority of any state law or custom, gave the federal judicial authorities power to arrest and punish any person guilty of this offense,

¹ One of the Senators elect from Georgia had been Vice-President of the defunct Confederacy.

³C. G., 39th Congress, 1st session, p. 2.

R. C., 39th Congress, 1st session, vol. ii, p. iii.

⁴C. G., 39th Congress, 1st session, appendix, p. 82.

⁶C. G., 39th Congress, 1st session, p. 915.

and also gave the federal courts jurisdiction over any case before a state court in which such discrimination was attempted.¹ This law created entirely new relations between federal and state authority, but since it was passed as an act to enforce the Thirteenth Amendment,² and applied to all states alike, it committed Congress to no declaration regarding the status of the southern states.

The joint committee made its long-expected report on April 30, 1866.3 A great number of witnesses had been examined regarding conditions in the South, whose testimony fills a large volume and purports to be the basis of the committee's report. The committee thought that since the Johnson governments had been set up under the military authority of the President and were merely instruments through which he had exercised that power in governing conquered territory, they were not regular state governments. This belief was confirmed by the fact that the existing state constitutions had been framed by conventions acting under the constant direction of the President, and also by the fact that they had not been submitted to the people for adoption. The Johnson governments then were not state governments at all, and so could not send representatives to Congress.

The committee appealed less to this constitutional argument than to arguments of policy. It was willing to grant the "profitless abstraction" that the southern states still remained states. The people of those states had waged war on the United States. Though subdued, they were defiant, disloyal, and abusive. They showed no disposition to abate their hatred for the Union or their affection for the Confederacy. To accord to such a people entire independence,

¹ U. S. L., vol. 14, p. 27.

² Trumbull's speech, C. G., 39th Congress, 1st session, p. 474.

⁸ R. C., 39th Congress, 1st session, vol. ii.

taking no measures for security from future danger; to admit their representatives to Congress; to allow conquered enemies "to participate in making laws for their conquerors;" to turn over to the custody of recent enemies the treasury, the army, the whole administration—this would be madness unexampled.

For these reasons the committee recommended a joint resolution and two bills. The resolution proposed an amendment to the Constitution forbidding any state to abridge the civil rights of citizens of the United States, or to deny to any person the equal protection of the laws, providing that a state which withheld the electoral franchise from negroes should suffer a deduction from its Congressional representation, and providing that until 1870 all adherents to the Confederacy should be excluded from voting for members of Congress and for Presidential electors. first of the two bills was to enact "that whenever the above recited amendment [should] have become a part of the Constitution of the United States, and any state lately in insurrection [should] have ratified the same, and [should] have modified its constitution and laws in accordance therewith." then its representatives might be admitted to Congress. second bill was to make ineligible to office under the United States men who had been prominent in the service of the Confederacy.

A minority of the committee took issue with the majority on both its legal and its political views. The states under consideration, said the minority, had never gone out of the Union; therefore, being states of the Union, Congress could not lawfully deprive them of their rights as states. That the Johnson governments were only the machinery of military occupation, set up by the conquering general, was denied.

We know [said the minority report] that [the southern states] have governments completely organized, with legislative, executive, and judicial functions. We

know that they are now in successful operation; no one within their limits questions their legality, or is denied their protection. How they were formed, under what auspices they were formed, are inquiries with which Congress has no concern.

A state is under no restriction as to the mode of altering its constitution; if it chooses to receive assistance from the President, or any one else, the validity of the amended constitution is not affected.

To the statement of the majority regarding the disposition of the southern people, the minority opposed the high authority of General Grant. In an official report he had said:

I am satisfied that the mass of thinking men of the South accept the present situation of affairs in good faith. . . . [They] are in earnest in wishing to do what they think is required by the government . . . and if such a course was pointed out they would pursue it in good faith.

The right way in which to deal with the southern people was, then, to conciliate them, as the President had tried to do, not to perpetuate their hostility.

If Congress adopted the program recommended by the majority, said the minority, it would repudiate its own solemn declaration made in 1861,

that this war is not waged upon our part in any spirit of oppression, nor purpose of overthrowing or interfering with the rights or established institutions of those states, but to defend and maintain the supremacy of the Constitution, and to preserve the Union, with all the dignity, equality, and rights of the several states unimpaired.¹

The proposed provisions regarding ineligibility would dishonor the government by annulling the pardons granted by the President. Further, the program contradicted itself, since it proposed to treat the southern communities as states, in submitting a constitutional amendment to them, while at the same time imposing on them conditions to which a state could not lawfully be subjected.

¹ Senate resolution (by Andrew Johnson), C. G., 37th Congress, 1st session, pp. 243, 265; House resolution (by Crittenden), *ibid.*, pp. 209, 222.



After a debate of which these two opposing reports are a convenient summary, Congress adopted the program of the committee. The joint resolution, changed into a form embodying the present Fourteenth Amendment, was passed on June 13, 1866.¹ The two bills proposed were taken up, but Congress adjourned without bringing them to a final vote, leaving the South to be regulated during the recess by the Civil Rights Act, and by an act, passed over the President's veto on July 16, embodying in a less drastic form the provisions of the Freedmen's Bureau Bill which had failed in February.²

When Congress met in December, 1866, the same voluminous mass of reconstruction proposals and declaratory resolutions appeared in both houses as at the last session. But the denunciation of the President and of the Johnson governments was more emphatic in these bills and resolutions, as well as in the debates. Sumner proposed a resolution to this effect:

That all proceedings with a view to reconstruction originating in executive power are in the nature of usurpation; that this usurpation becomes especially offensive when it sets aside the fundamental truths of our institutions; that it is shocking to common sense when it undertakes to derive new governments from the hostile populations which have just been engaged in armed rebellion, and that all governments having such origin are necessarily illegal and void.³

Another resolution proposed that the committee of the House on territories be instructed to take steps for organizing the districts known as Virginia, North Carolina, etc., into states. Cullom said in a speech:

During the last session of this Congress we sent to the country a proposed amendment to the Constitution. The people of the rebel states by their pretended legislatures are treating it with scorn and contempt. It is time, sir, that the people of the states were informed in language not to be misunder-

¹ U. S. L., vol. 14, p. 358.

² Ibid., p. 173.

⁸ U. S. Senate Journal, 39th Congress, 2d session, p. 21.

stood that the people who saved this country are going to reconstruct it in their own way, the opposition of rebels to the contrary notwithstanding.¹

Another fact which appeared prominently in the speeches and resolutions of this session was the growing fear, real or assumed, that freedmen and loyal persons in the South were in mortal danger. Bills for their protection were introduced by the dozen.

Shall we shut our eyes [said a speaker] to the abuse and murders of loyal men in the South, and the continued destruction of their property by wicked men, and give them no means of protection?²

Stevens exclaimed that the United States would be disgraced unless Congress proceed[ed] at once to do something to protect these people from the barbarians who [were] daily murdering them; who [were] murdering the loyal whites daily, and daily putting into secret graves not only hundreds but thousands of the colored people.⁸

At first the lower house resumed its consideration of the bills recommended at the 'ast session by the joint committee. But early in February, 1867, these were dropped in favor of a new bill. This was the Reconstruction Bill which became law on March 2. It provided that the South should be divided into five districts, each to comprise the territory of one or more of the southern states. The President should assign to each district a military officer not below the rank of brigadier-general, and should detail for his use a sufficient military force. The duties of these officers should be "to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish, or cause to be punished, disturbers of the public peace and criminals." To this end they might either allow local courts to exercise their usual jurisdiction or organize special military courts, for the procedure of which a few general regulations were provided in the bill. Until the states should be by law restored to the Union, the governments existing in

¹C.G., 39th Congress, 2d session, p. 814.

² Ibid.

⁸ C. G., 39th Congress, 2d session, p. 251.

them were declared "provisional only, and in all respects subject to the paramount authority of the United States, at any time to abolish, modify, control or suspend the same."

In section 5 of this bill were stated the conditions upon which the southern states might regain their places in the Union. In each of them a constitutional convention should be elected. For members of this convention all male "citizens" of the voting age should vote, except those excluded from office by the pending Fourteenth Amendment. These were forbidden to sit in the convention or to vote for delegates. The convention thus formed should frame a new constitution, which should give the franchise to all persons qualified to vote for delegates by the present bill. The constitution should be submitted to the people of the state for ratification, and to Congress for approval. When these should have been received, and when the legislature elected under the new constitution should have ratified the Fourteenth Amendment, then Congress should pass an act admitting the reconstructed state to Congressional representation, and the present law should cease to operate in that state.1

The principle of this bill was the same as that of the reconstruction measures first undertaken at the suggestion of the joint committee, namely the punishment of an enemy. The debate in the House was opened by a felicitous quotation from Vattel on the public law applicable to the case of a conquered enemy.² The punishment here provided was, however, more severe than that first proposed. The former program was designed to offer to the states the alternative of adopting the Fourteenth Amendment or remaining out of the Union and under the Freedman's Bureau—which was, indeed, regarded as a very obnoxious alternative. But the present bill required them not only to ratify the amend-

¹ U. S. L., vol. 14, p. 428.

² C. G., 39th Congress, 2d session, p. 1076.

ment, but to adopt new constitutions, elect new governments, enfranchise the negroes, and disfranchise their most prominent and respected citizens; and meanwhile imposed upon them not simply a bureau, to interfere in individual cases, but the virtually absolute rule of a military governor.

This bill was passed over Johnson's veto on March 2, 1867. On March 23 a supplementary act was passed, providing means for executing section 5 of the preceding act. The initiative in calling the constitutional conventions, instead of being left to the states, to be exercised or not, as they chose, was now assigned to the military governor. He, with the assistance of such boards of registry as he might create, was directed to register all persons qualified to vote for delegates. He should then fix the number of delegates and arrange the plan of representation, set the day for election and summon the convention.

A third reconstruction act was passed on July 19, 1867. It is unnecessary to discuss it, since it was only explanatory of the acts of March 2 and 23, and added nothing which needs mention here to their provisions.²

Were the Reconstruction Acts constitutional? Since the Supreme Court has failed, either voluntarily or otherwise, to decide every case brought before it depending upon this question,³ reasoning is not rendered idle by authority. The Supreme Court has indeed expressed a definite opinion on the subject, but has given no decision.

The opinion referred to was expressed in the case of Texas versus White. The Court said:

These new relations [namely, those created by the civil war] imposed new duties

¹ U. S. L., vol. 15, p. 2.

² /bid., p. 14.

³ Mississippi versus Johnson, 4 Wallace, 475; Georgia versus Stanton, 6 Wallace, 51; Ex parte McCardle, 6 Wallace, 324, and 7 Wallace, 512.

^{4 7} Waliace, 700.

upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the states with the Union. The authority for the performance of the first had been found in the power to suppress insurrection and to carry on war; for the performance of the second, authority was derived from the obligation of the United States to guarantee to every state a republican form of government.

This the Court considered good authority for the passage of the Reconstruction Acts. Most of the advocates of the acts based them upon this theory.

Now, upon that clause of Article IV., Section 4, of the Constitution which says: "The United States shall guarantee to every state in this Union a republican form of government," the Federalist remarks:

It may possibly be asked whether [this clause] may not become a pretext for alterations in the state governments without the concurrence of the states themselves. . . . But the authority extends no further than to a guarantee [the Federalise's italies] of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed.

The intention of the clause, says the Federalist in the same paper, is simply to guard "against aristocratic or monarchic innovations." To one not interested in establishing the constitutionality of the Reconstruction Acts, it seems indisputable that the clause is rightly interpreted by the Federalist. Story accepts this interpretation as a matter of course. Cooley groups the clause with that which forbids the states to grant titles of nobility. If this interpretation is correct, then the guarantee clause gives no authority for destroying a state government of a republican form and substituting another.

There is, however, a constitutional basis for the Reconstruction Acts. It is the war power of Congress.

If a section of the people of a state rebels against the gov-

¹ The Federalist, no. 43.

² Story on the Constitution, chap. 41 (4th edition).

³ Cooley on the Constitution, p. 23 (4th edition).

international law. But as it may assume the physical character of a war, so it may call into existence the rights and sustems incident to war. Upon this principle the federal government acquired the rights of war in the contest of \$861-1865.* Now the rights of war do not end with military operations; one of these rights is the right of the victorious party, after an unconditional surrender, to occupy the territory of the defeated party, to govern or punish the people as it sees fit. If the United States government acquired the rights of war, this right was included. The close of a war is not simultaneous with the cessation of fighting. The surrender of the southern armies was an important incident in the civil war; it was not the end. If the federal government had the rights of war before this incident, it had them after.

The United States government might therefore say to the persons composing the military power which it had subdued: As the terms of war, you are to be governed by military government. If the persons against whom this sentence is assumed to have been pronounced formed the majority of the population of a state, one result of the sentence would be to suspend independent state government. The United States government might choose another pun-It might say to the lately hostile persons: forbid you to participate in the federal government. persons so sentenced form the majority of the population of a state, that state can send no representatives to Congress while the sentence remains. These sentences might be imposed permanently or only until such time as the people sentenced should fulfil certain demands—hold certain conventions, pass certain laws, adopt certain resolutions in certain ways. The federal government can thus effect through

1 Prize Cases, 2 Black, 687.

its war powers what it cannot effect through any power to interfere directly with a state government. It had no right to reconstruct the government of Maine in 1865, because Maine had no body of people over whom the federal government could exercise war powers. It had the right to reconstruct the government of Georgia, because nine-tenths of the people of Georgia were lawfully at its mercy as a conqueror.

Even if it be admitted, however, that the federal government had the power described, it may still be argued that the Reconstruction Acts are not legally justified. A conqueror has a right to govern a conquered people as he pleases and as long as he pleases; he also has a right to alter his mode of treatment and substitute another mode. But after he has imposed certain terms as final, after the requirements of these terms have been complied with, after he has restored the conquered people to their normal position and rights and has unmistakably terminated the relation of conqueror to conquered—then his rights of war are at an It may be argued that this was the case when the Reconstruction Acts were passed. It may be argued that in December, 1865, the federal government had, through the President, terminated its capacity as a conqueror, and could regain that capacity only by another war; that after that termination it had no more power to reconstruct Georgia than to reconstruct Maine.

This argument is irrefutable if we assume that the President had full power to act for the federal government in the disposition of the defeated Secessionists, and that therefore his acts of 1865 were the acts of the federal government. In case of an international war, which is closed by a treaty, the President may (if supported by the Senate) act finally for the federal government, and estop that government (so far as international law is concerned) from further action. But at the close of a civil war he cannot exercise his diplomatic

power. The disposition of the defeated people in this case falls to the legislative branch of the government.

If the President had pardoned a great majority of the Secessionists, that fact perhaps might have legally estopped Congress from passing the Reconstruction Acts. These acts were a war punishment, and a pardon cuts off further punishment. But the total number of persons who received amnesty under the proclamation of May 29, 1865, was 13,596,2 which was of course only a small fraction of the Secessionist population.

The passage of the Reconstruction Acts may thus be regarded, from a legal point of view, as simply the substitution of one method of treating the defeated enemy for another. The change was from mildness to harshness. It was doubly bitter to the defeated enemy, after he had been led to believe that his punishment was over, to be subjected to a worse one. But these are not legal considerations.

That the Reconstruction Acts required communities not states to ratify a constitutional amendment did not affect their legality. That an amendment depended for its validity on such ratification might make the amendment void (though even from this result there is a means of escape in the theory of relation, to be mentioned later), but that would not affect the act requiring the ratification. That this requirement was not made with the exclusive purpose of obtaining votes for the passage of the amendment is shown by a resolution introduced into the House of Representatives on July 21, 1867, which reads:

Resolved, That in ratifying amendments to the Constitution of the United States . . . the said several states . . . are wholly incapable either of accepting or rejecting any such amendment so as to bind the loyal states of the Union, . . . and that when any amendment . . . shall be adopted by three-fourths of the states

¹ Ex parte Garland, 4 Wallace, 333.

² Archives of the Department of State, Washington.

recognized by the Congress as lawfully entitled to do so, . . . the same shall become thereby a part of the Constitution.¹

What virtues the Reconstruction Acts had besides legal regularity will be discussed later.

¹ C. G., 39th Congress, 2d session, p. 615. For other expressions of the same doctrine, see Cullom's speech, *ibid.*, p. 814; Sumner's resolutions, C. G., 39th Congress, 1st session, p. 2; Sumner's resolutions, C. G., 40th Congress, 2d session, p. 453.

CHAPTER IV

THE ADMINISTRATIONS OF POPE AND MEADE

In the Third Military District, of which Georgia was a part, the Reconstruction Acts were administered from April 1, 1867, to January 6, 1868, by General Pope, and from January 6 to July 30, 1868, by General Meade. The present chapter will describe, first, the manner in which these men conducted the political rebuilding of Georgia, and second, the manner in which they governed during this process.

On April 8 Pope issued his first orders regarding the registration of voters. The three officers commanding respectively in the sub-districts of Georgia, Florida and Alabama were directed to divide the territory under them into registration districts, and for each of these to appoint a board of registry consisting as far as possible of civilians. On May 2 the scheme of districts for Georgia was published. The state was divided into forty-four districts of three counties each, and three districts of a city each. For each district the names of two white registrars were announced, and each of these pairs was ordered to complete the board by selecting a negro colleague. The compensation of registrars was to be from fifteen cents to forty cents for every name registered, varying according to the density or sparseness of the population. It was made the duty of registrars to explain to those unused to the enjoyment of suffrage the nature of this function. After the lists were complete they were to be published for ten days.3

¹G. O. H., 1867, no. 18 and 104; 1868, no. 55; G. O. T. M. D., 1867, no. 1; 1868, no. 3 and 108.

⁸ *Ibid.*, 1867, no. 20. [496

² G. O. T. M. D., 1867, no. 5. 38

The unsettled condition of the negro population suggested to Pope the possibility that many negroes would lose their right to vote by change of residence. He therefore ordered on August 15 that persons removing from the district where they were registered should be furnished by the board of registry with a certificate of registration, which should entitle them to vote anywhere in the state."

The election for deciding whether a constitutional convention should be held, and for choosing delegates in case the affirmative vote prevailed, was ordered to begin on October 29 and to continue three days. Registrars were ordered to revise their lists during the fortnight preceding the election, to erase names wrongly registered, and to add the names of persons entitled to be registered. The boards of registry were to act as judges of election, but registrars who were candidates for election were forbidden to serve in the districts where they sought election.

The election was to occupy the last three days of October. On October 30 Pope extended the time to the night of November 2, in order to give the negroes ample opportunity to vote, which in their inexperience they might otherwise fails to do.³

After the election the following figures were announced:

Number of registered voters in Georgia Of these the negroes numbered							
				"	44	for a convention	102,283
				44	66	against a convention	4.127

The delegates elected were ordered to meet in conven-

¹G. O. T. M. D., 1867, no. 50. ² *Ibid.*, 1867, no. 69. ³ *Ibid.*, 1867, no. 83. ⁴ *Ibid.*, 1867, no. 89. Also see Pope's Report, in R. S. W., 40th Congress, 2d session, vol. i, p. 320.

There is a slight inaccuracy in the official figures.

tion on December 9th. On that day the convention met in Atlanta. Its business was not completed until the middle of March in the following year. The constitution which it framed more than met the demands of the Reconstruction Acts. A single citizenship was established for all residents of the state, in language borrowed from the Fourteenth Amendment to the federal Constitution.² Legislation on the subject of social status of citizens was forever prohibited.3 The electoral right was given to all male persons born or naturalized in the United States who should have resided six months in Georgia.4 Electors were privileged from arrest (except for treason, felony or breach of the peace) for five days before, during, and for two days after, elections, and the legislature was ordered to provide such other means for the protection of electors as might be necessary.5 Other provisions presumably acceptable to northern sentiment were the prohibition of whipping as a penalty for crime,6 and the command that the legislature should create a system of public schools free to all children of the state.7

By an ordinance of the convention, made valid by being embodied in military orders, April 20, 1868, was appointed for the submission of the new constitution to popular vote, and also for the election of members of Congress and officers of the new state government.⁸ This election resulted in the adoption of the constitution by a majority of 17,699 votes, and in the election of a governor (Rufus B. Bullock by name), a legislature, and a full delegation to the lower house of Congress.⁹ The remaining requirement of the Reconstruction

⁷ Ibid., art. vi, sect. i.

¹G.O. T. M. D., 1867, no. 89.

² Georgia Constitution of 1868, art. i, sec. i. ³ Ibid., art. i, sect. xi.

⁴ Ibid., art. ii, sect. ii.

⁶ Ibid., art. ii, sect. vii, § 10.

⁶ Ibid., art. i, sect. xxii.

⁸G. O. T. M. D., 1868, no. 39 and 40.

^{*} Ibid., no. 76, 90 and 93. Also, E. D., 40th Congress 2d session, no. 300.

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Acts was that the new legislature convene and ratify the Fourteenth Amendment. This transaction will be reserved for the next chapter.

General Pope was inspired by the ideas and emotions from which reconstruction had sprung. He was an ardent friend of the reconstruction measures. He was convinced of the importance of suppressing the old political leaders in his district. He held with enthusiasm the optimistic views prevalent in the North regarding the negroes. Their recent progress in "education and knowledge," he said, was "marvellous," and if continued, in five years the intelligence of the community would shift to the colored portion. The purport of his orders, the didactic style in which they are couched, the declarations of his principles which frequently accompany these orders, indicate the spirit in which he administered the office of military governor.

Most of the official acts of Pope concerned either the enforcement of obedience and the suppression of disobedience to the letter and spirit of the Reconstruction Acts, or the protection and promotion of the present interests of the freedmen.

In assuming command he announced that in the absence of special orders all persons holding office under the state government would be permitted to retain their positions until the expiration of their terms. Their successors, however, were to be appointed by Pope alone; no elections should be held in the state except those required by Congress. The general expressed the hope that no necessity for interference in the regular operation of the state government would arise. It could arise, he said, only from the failure of state tribunals to do equal justice to all persons.² A few

¹ Pope's Report in R. S. W., 40th Congress, 2d session, vol. i, p. 320.

² G. O. T. M. D., 1867, no. 1.

weeks later he announced that this necessity would also arise if any state officer interfered with or opposed the reconstruction measures; such an officer, it was "distinctly announced," Governor Jenkins, on April 10, had would be deposed." issued a letter to the public, advising them to abstain from registering and voting under the Reconstruction Acts. Pope had excused him with a lecture, and then issued the order referred to, to make clear that no more advice of that sort from state officers would be permitted. Opposition to reconstruction by state officers was declared to include also the awarding of state printing to newspapers which opposed reconstruction, and it was ordered that thereafter the state's patronage should be given only to loyal papers.3 Another measure to the same end was the order that no state court should entertain any action against any person for any acts done under the military authority.4 But while opposition by state officers was thus dealt with, freedom of public opinion was emphatically declared. The declaration accompanied a public reprimand administered to the post commander at Mobile for interference with a newspaper.5

The careful consideration for the needs of the freedmen shown in the general's method of forming the boards of registry, in his instructions to the registrars, in his provision of certificates of registration to migrating citizens, and in his extension of the time of election, has been pointed out. Of a similar character was the warning to employers that any attempt to prevent laborers from voting, or to influence their votes by docking wages, threats, or any other means, would be severely dealt with.⁶

In his first general orders, as we have said, Pope warned

¹ G. O. T. M. D., 1867, no. 10.

² For the correspondence between Jenkins and Pope see A. A. C., 1867, p. 363.

⁸G. O. T. M. D., 1867, no. 49.

⁴ Ibid., 1867, no. 45.

⁵ Ibid., 1867, no. 28.

^{6 /}bid., 1867, no. 69.

the judiciary against racial prejudice. It was probably disregard of this warning which caused the removal of about a dozen judges, justices of the peace, and sheriffs. In the interest of equal justice, Pope also ordered that grand and petit jurors should be selected impartially from the lists of voters registered under the Reconstruction Acts. Besides this general protection, individual relief was given by release from arrest, mitigation of the conditions of confinement, reduction of fines, and other special dispensations. The method of securing justice mentioned in the Act of March 2, 1867, namely by ordering the trial of cases by military commissions, was employed by Pope only once.

Such was the administration of Pope. Its influence on the personnel of the state government was large, but was exercised only slightly through removal, chiefly through appointment to fill vacancies. Pope removed about fifteen state officers (almost all of whom were the judicial officers mentioned in the preceding paragraph). He filled about two hundred vacancies.⁵ It is significant that a great number of these were caused by resignation. His acts of interference with the action of state officers were few, and with all his zeal for the success of reconstruction, he favored freedom of speech. Nevertheless, his opinions and his personal character, combined with such interference as he did practice, served to gain for him the dislike of the people and the rather unjust reputation of a petty tyrant.

Though Meade lacked Pope's zealous enthusiasm for reconstruction, yet he held much the same opinion as his predecessor regarding the duties with which he was charged. Like Pope, he forbade the bestowal of public patronage on

¹ S. O. T. M. D., 1867, passim.

² G. O. T. M. D., 1867, no. 53.

⁸ S. O. T. M. D., 1867, no. 92, 100, 104. 4 /bid., 1867, no. 263.

⁶ These figures are compiled from the special orders of the Third Military District.

anti-reconstruction newspapers. Like Pope, he thought it his duty to depose state officers who opposed the execution of the Reconstruction Acts. When he assumed command he found the convention at loggerheads with the governor and the state treasurer. The convention had levied a tax to pay its expenses, and pending the collection of it had directed the treasurer to advance forty thousand dollars.2 The treasurer (Jones by name) declined to do this except on a warrant from the governor, according to the regular practice. quested Jenkins to issue the warrant. Jenkins refused, on the ground that the act would violate the state constitution under which he held office, and that even if it were authorized by the Reconstruction Acts (which he denied), that was an authorization contrary to the Constitution of the United States, upon which he would not act.3 Thereupon, on January 13, 1868, Meade issued an order by which the governor (designated as the "provisional governor") and the treasurer (also designated as "provisional") were removed and Brigadier-General Ruger and Captain Rockwell "detailed" to act as governor and treasurer respectively.4 For this act the convention rewarded Meade with a resolution of gratitude.5 Before the end of the same month the state comptroller and the secretary of state were also removed for ob-

¹G. O. T. M. D., 1868, no. 22.

² Ordinance of Dec. 20, 1867, J. C., 1867-8, p. 564.

³ Avery, History of Georgia, p. 378.

⁴G. O. T. M. D., 1868, no. 8. Meade acted with the greatest courtesy, and the relations between him and the officers remained friendly. See Meade's letter to Jenkins, A. A. C., 1867, p. 367. The removal of the treasurer was a formality to preserve the appearance of due discipline; Jones was allowed to retain the money then in the treasury, and to use it in paying the state debt and other expenses of the state government. See his report to the legislature, Sept. 18, 1868; H. J., 1868, p. 359.

⁵ J. C., 1867-8, p. 581.

structing reconstruction, and later the mayor and the entire board of aldermen of Columbus shared the same fate.

Toward the freedmen General Meade assumed the attitude of his predecessor. He made similar rules to protect them, in voting, from coercion by employers.³ On the other hand, observing that too frequent enticement of negroes to political meetings was disturbing industry, he announced that interference of this sort with the rights of employers by political agitators would meet with the same punishment as interference with the rights of freedmen.⁴

Besides following the two policies of suppressing resistance and protecting freedmen, Meade used his power to a great extent simply in the interest of the general welfare. peace and order seemed threatened on the eve of the April election. Orders issued on April 4 expressed the belief that there existed a concerted plan, extending widely through the Third District and apparently emanating from a secret organization, to overawe the population and affect elections. Both military and civil officers were ordered to arrest publishers of incendiary articles and to organize special patrols.5 Troops were distributed so as to command the parts chiefly in danger,6 and the frequent resignation of office by sheriffs occasioned the order that no more resignations would be permitted, but that the sheriffs must retain their offices and execute the law.7 By way of benevolent despotism, Meade, at the request of the convention, suspended the operation of the bail process and of the writ of capias satisfaciendum, and promulgated the provisions of the new constitution for the relief of debtors until the constitution should become law.8 Likewise he gave special orders in eight or ten cases sus-

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<sup>1</sup>G. O. T. M. D., 1868, no. 12 and 17.
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⁸G. O. T. M. D., 1868, no. 39 and 57.

⁶ Ibid., 1868, no. 51.

¹ Ibid., 1368, no. 57.

³ S. O. T. M. D., 1868, no. 112.

⁴ Ibid., 1868, no. 58.

⁶ Ibid., 1868, no. 54.

^{*} Ibid., 1868, no. 27 and 37.

pending trials, releasing prisoners, and otherwise preventing hardship or failure of justice. Whereas Pope had convened one military court, Meade convened six, and before these thirty two cases were tried. Meade appointed about seventy state officers and removed about twenty.

These facts show that the two administrations we are considering were alike in policy, and that in action Meade's was the more vigorous. Nevertheless, while Pope was disliked, Meade, thanks to a more attractive character, enjoyed a certain popularity.

Such was the process by which the Disciplinarians, the Humanitarians, and the Republican Politicians hoped to gain their respective purposes. What were the results of the process by the end of the administration of Meade?

For the Disciplinarians they were not encouraging. Military government was received not as discipline but as bullying. The spirit which reconstruction was designed to quell was only embittered; for to those who entertained it reconstruction was not the chastening of the nation, but the domineering of a political party, which it was hoped and believed would soon lose its ascendency.²

For the Humanitarians reconstruction had produced written laws regarding equality of civil and political rights, which were deemed a subject of congratulation. Outside the laws they would have found less encouragement. The kindness of the white people toward the negroes had been changed to apprehension by the events of 1865. When the advent of negro suffrage brought the carpet-baggers to the South to marshal the negro voters for their own benefit, and when these men began to disturb the negroes by organizing them into mysterious Union Leagues and giving them

¹G. O. T. M. D., 1868, no. 27, 55, 99, 123, 136, and 148.

⁹ M. F. U., Oct. 29, 1867.

indigestible ideas of their rights, apprehension became alarm. Negroes seized property of all kinds-including even plantations - by violence, supposing this to be one of their new rights. Already they had raised a new terror by crimes against white women, hitherto unknown. thoughtful men believed that the best defence against the dangers apprehended from the disturbed black population was kindness and friendly influence. This opinion was not heard after the arrival of the carpet-baggers; its methods were then seen to be inadequate. Secret organizations were formed by white men for protection against the negroes. These organizations, which sowed the seed of a subsequent harvest of crime, at first included men of the best character and of the highest standing.2 Thus reconstruction, together with its written laws, had produced conditions which made the net Humanitarian results doubtful, at least for the moment.

For the Republican Politicians reconstruction did not produce in Georgia all that was to be desired. When the enterprise was first launched some of the white men, though offended, favored accepting the inevitable and endeavoring to elect good men to the constitutional convention and to the new state government.³ Others, carried further by their anger, determined to take no part in elevating the negroes and debasing their heroes. Prominent among these, as we have said, was Governor Jenkins. These men stayed at home on October 29, 1867, contemptuously ignoring the "bogus concern called an election," which occurred on that day.⁴ Many of these latter, by the time the "motley crew assembled at Atlanta" had finished its labors, decided to

¹ Atlanta New Era, Nov. 16, 1866; March 13, 1867; March 19, 1867.

² Testimony of John B. Gordon, K. K. R., vol. 6, p. 308.

⁸ Atlanta New Era, March 13, 16 and 30, 1867.

⁴ M. F. U., Oct. 29 and Nov. 5, 1867.

follow the example of the former. A convention met at Macon on December 5, 1867, formed a party, the Georgia Conservatives, named a ticket, with John B. Gordon at the head, and began a powerful campaign for the defeat of negroes and adventurers at the April election. To make an active fight was recognized as a better course than to stand in ineffectual scorn. As a result the sweeping victory expected by the Republican Politicians did not occur in Georgia. A Republican governor was elected; but in the state senate the seats were equally divided between the Republicans and the Conservatives, in the state house of representatives the Conservatives obtained a large majority, and of the seven Congressmen elected three were Conservatives.

¹ A. A. C., 1868, p. 309.

²Testimony before the reconstruction committee, H. M. D., 40th Congress, 2d session, no. 52, p. 26. See also M. F. U., March 10 and 17, 1867.

^{*}Tribune Almanac for 1869, p. 78.

CHAPTER V

THE SUPPOSED RESTORATION OF 1868

THE passage of the Reconstruction Acts of 1867 determined the course of reconstruction, but did not stop discussion. When Congress met in December, 1867, the acts passed continued to be attacked and defended and new bills to be introduced and dropped. But the plan as adopted remained untouched, with one exception.

One of the reasons given by the joint committee on reconstruction for abolishing the Johnson governments was that the Johnson constitutions had not been ratified by ponular vote, and therefore did not rest upon the consent of a majority of the people. To avoid a like defect in the new governments the act of March 23 had provided that the new constitutions should be regarded as adopted only if a majority of the registered voters took part in the vote on the question of adoption. At its next session Congress repented of this provision; it was now seen to involve the risk that the opponents of reconstruction in the southern states would defeat the new constitutions by the plan of inaction, This risk should be avoided, since the adoption of a state constitution probably meant the election of a Republican state government, and hence of Republican Senators, as well as Republican Congressional Representatives and Republican Presidential Electors in November, 1868. advantages would be lost if the new constitutions were de-Therefore, by an act which became law on March 11, 1868, the reconstruction legislation was amended so as to provide that elections held under that legislation should be 507]

decided by a majority of the votes cast. This act also adopted as part of the general scheme two expedients already employed by Pope in the Third District. That is to say, it provided that any registered voter might vote in any election district in his state, provided he had lived there ten days, and that the elections should be "continued from day to day."

Aside from these alterations, Congress allowed reconstruction to complete its course according to the first plan. Within the first six months of 1868 North Carolina, South Carolina, Louisiana and Florida, besides Georgia, had adopted new constitutions. According to the Act of March 2, 1867, two more steps would complete the process for these states; namely, the ratification by their legislatures of the Fourteenth Amendment, and the declaration "by law" (provided Congress approved the constitutions) that they were entitled to representation in Congress.² Congress now decided, instead of waiting for the ratification of the amendment, to pass the declaratory law at once, which should operate as soon as the ratification should have occurred. By this method one act would suffice for all the states which had adopted constitutions.

The bill for this purpose was called the Omnibus Bill. It provided that North Carolina, South Carolina, Georgia, Florida, Louisiana, and also Alabama,³ should be admitted to representation in Congress as soon as their legislatures elected under the new constitution should have ratified the Fourteenth Amendment, on condition that the provisions of that amendment regarding eligibility to office should at once



¹ U. S. L., vol. 15, Public Laws, p. 41.

² See sects. 5 and 6.

The vote in Alabama on the adoption of the constitution resulted in favor of adoption; but less than half of the registered voters voted, and the vote was taken before the passage of the act of March 11, 1868, above mentioned. Excuse was found by the Republican leaders for waiving this irregularity. C. G., 40th Congress, 2d session, p. 2463.

go into operation in those states, and on condition that the constitution of none of them should ever be amended so as to deprive of the right to vote any citizens entitled to that right as the constitutions then stood. A special condition was imposed on Georgia; namely, that Article V., section 17. §§ 1 and 3 of her constitution be declared void by the legislature. A precedent for such a requirement was found in the act of 1821, admitting Missouri to statehood. The bill gave the governors-elect in the states concerned authority to call the legislatures immediately to fulfill the required conditions.

The Omnibus Bill became law on June 25, 1868. On the same day Rufus B. Bullock, the governor-elect of Georgia, issued a proclamation in accordance with the act, summoning the legislature to meet on July 4th.³

Now, the Reconstruction Act of July 10th, 1867, had provided as follows:

All persons hereafter elected or appointed to office in said military districts, under any so-called state or municipal authority, or by detail or appointment of the district commanders, shall be required to take.....the oath of office prescribed by law for officers of the United States.

On April 15th Meade had announced that in accordance with this provision the members of the legislature to be elected on April 20th would be required to subscribe to the Test Oath. But he was later advised from headquarters, and by certain prominent members of Congress, that the persons contemplated by the act of July 19, 1867, were those elected under the Johnson government, not under the new government; and that therefore the men elected on April

¹ C. G., 40th Congress, 2d session, p. 2859 (Trumbull's speech).

²U. S. L., vol. 15, Public Acts, p. 73.

⁸ S. J., 1868. p. 3.

⁴The Iron Clad or Test Oath, to the effect that the person swearing had never borne arms against the United States, or in any way served the Confederacy. U. S. L., vol. 12, p. 502.

⁶G. O. T. M. D., 1868, no. 61.

authority" in the sense of the act of July 19th. The eligibility of these men, he was told, was to be determined by the provisions of the new constitution and by the Fourteenth Amendment, and they were not required to take the Test Oath. Meade therefore did not enforce his order. But though the new government was exempt from this one requirement of the Reconstruction Acts, it was subject to the provision which said:

..... until the people of said rebel states shall be by law admitted to representation in the Congress of the United States, any civil government which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States.

Over the new state government, as over the old, Meade would exercise the powers of a district commander until the legislature by complying with the requirements of the Omnibus Act, should have made that act operative.

On June 28 Meade relieved General Ruger of the office of governor and appointed in his place the governor-elect, Bullock, whom he directed to organize the legislature on July 4.º When the legislature met on that day, therefore, Bullock called each house to order in turn, and under his direction as chairman the members were sworn in (by the official oath prescribed in the state constitution), and the presiding officers elected.

On July 7 the legislature informed the governor that it was organized and ready to proceed to business. Bullock, instead of replying, wrote to Meade, stating that it was alleged that a number of men seated in the legislature were ineligible to office according to the proposed Fourteenth Amendment, and hence were disqualified from holding their

¹ S. R., 40th Congress, 3d session, no. 192, p. 38. See also C. G., 41st Congress, 1st session, p. 594.

²G. O. T. M. D., 1868, no. 98.

seats by the Omnibus Act. Meade replied on July 8 that the allegation was serious, and that he would not recognize as valid any act of the legislature until satisfactory evidence should be presented that the legislature contained no member who would be disqualified from office by the Fourteenth Amendment.² Bullock sent Meade's letter to the legislature, and both houses appointed committees to investigate the eligibility of every member. These committees reported on July 17. The senate committee reported that no senators were ineligible. A minority of the committee found, on evidence detailed in its report, that four were ineligible. After much debate the majority report was adopted.3 The house committee reported that two representatives were ineligible. A minority report found three ineligible. A second minority report found that none were ineligible. The last was adopted.4

The conclusions of the two houses may be regarded, in view of these proceedings, with some just suspicion. Bullock in informing Meade of them expressed the opinion that the legislature had failed to furnish the "satisfactory evidence" upon which Meade had conditioned his recognition. If Meade had desired to know the exact truth, he might well have accepted Bullock's advice and ignored the reports, investigated the records of the legislators himself, and excluded those whom he found ineligible. But Meade desired only to see that the acts of Congress were complied with. "Satisfactory evidence" was evidence not logically, but formally satisfactory. Meade followed the established principle that legislative bodies are the final judges of the eligibility of their members. He considered the statement of

¹ S. R., 40th Congress, 3d session, no. 192, p. 7.

² Ibid. See also H. J., 1868, p. 25.

⁸S. J., 1868, p. 34. ⁴ H. J., 1868, pp. 36, 44.

⁶ S. R., 40th Congress, 3d session, no. 192, p. 8.

the legislature that its members were all eligible formally satisfactory evidence that the acts of Congress were obeyed. Having this evidence, he refused to interfere further. decision was influenced partly by reluctance to interfere more than was necessary, and partly by aversion to aiding Bullock to gain a party advantage, which he alleged to be the governor's chief motive in urging the rejection of the reports." He acted with the approval of the general of the army.2

He notified the governor that the legislature was legally organized from the date of the adoption of the reports (July 17).3 Bullock transmitted this message to the legislature on July 21. On that day both houses ratified the Fourteenth Amendment and declared void the sections of the constitution required to be so declared by the Omnibus Act.

As soon as the legislature had performed these acts Georgia was, presumably, according to the acts of Congress, a state of the Union. On July 22 Meade directed all state officers holding by military appointment to turn over their offices to those elected or appointed under the new government.5 On July 28 orders issued from the headquarters of the army stating that the general commanding in the Third Military District had ceased to exercise authority under the Reconstruction Acts, and that Georgia, Florida and Alabama no longer constituted a military district, but should henceforth constitute an ordinary military circumscriptionthe Department of the South.6 On July 22 Bullock, who had up to that time been governor by military appointment, was inaugurated in the regular manner and became governor under the state constitution.7 On July 25, the seven

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<sup>1</sup> S. R., 40th Congress, 3d session, no. 192, p. 38.
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4 II. J., 1868, p. 52. ⁷ H. J., 1868, p. 57.



⁸ Ibid., p. 13.

⁵G. O. T. M. D., 1868, no. 103.

G. O. H., 1868, no. 55.

congressmen-elect from Georgia were seated in the House of Representatives.² The Georgia Senators would doubtless have been seated at this time if they had arrived before the close of the session; but they were elected by the legislature on July 29,² two days after Congress adjourned.³ In view of Georgia's compliance with the Reconstruction Acts and the Omnibus Act, and in view of the various official recognitions that that compliance was complete, there could now be no doubt that her reconstruction was accomplished and her statehood regained.

¹C. G., 40th Congress, 2d session, pp. 4472, 4499, 4500.

³ H, J., 1868, p. 104. ³ C. G., 40th Congress, 2d session, p. 4513.

CHAPTER VI

THE EXPULSION OF THE WEGROES FROM THE LEGISLA-TURE AND THE USES TO WHICH THIS EVENT WAS APPLIED.

WHEN the Georgia Republicans, or Radicals, as they were locally called, found that instead of a sweeping victory they had won only a governorship hemmed in by a hostile legislature, an effort was made, as we have said, to improve their position through the interference of Meade. Meade refused to aid them. When, a short time afterwards, federal power, on which they had hitherto relied, was completely withdrawn, they seemed left to make the best of an uncomfortable position without any assistance. At this point a god appeared from the machine.

In the state senate there were three negroes, in the lower house twenty-five. Their presence was an offense. It was an offense not merely to the Conservative members. Some of the Republicans entertained Conservative sentiments and principles, but supported reconstruction simply in order to hasten the liberation of the state from Congressional interference.* To them as well as to the Conservatives "negro rule" was obnoxious. Negro rule, so far as it consisted in negro suffrage, was established by the constitution. But negro office-holding was not so established expressly. As early as

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¹ A. A. C., 1868, p. 312.

²The most prominent of these was Ex-Governor Brown. He went as a delegate to the Republican National Convention in 1868, but in a speech there declared his opposition to the granting of political power to the negro. Avery, History of Georgia, p. 385.

July 25, 1868, the question, whether negroes were eligible to the legislature, was raised in the state senate.²

Legally considered, the question had two sides, each supported by eminent lawyers. For the negroes it was argued that Irwin's Code, which was made part of the law of the state by the constitution,2 enumerated among the rights of citizens the right to hold office.3 Negroes were made citizens of equal rights with all other citizens by the new constitution.4 Therefore they had the right to hold office. was true that the constitution did not grant the right to hold office to the negroes expressly, as it granted the right to vote: but in view of the fact that the convention which made the constitution was elected by 25,000 white and 85,-000 colored men, and that that constitution was adopted by 35,000 white and 70,000 colored men, it would be absurd to suppose that the intent of that instrument was to withhold office from the negroes.5 On the other side, it was argued that the right to hold office did not belong to every citizen, but only to such citizens as the law specially designated, or to such as possessed it by common law or custom. Irwin's Code could not be cited to prove that negroes had the right, because that law had been enacted before the negroes had been made citizens, and the word citizens in it referred to those who were citizens at that time. the negro had no right to hold office because he was a citizen, and as he could not claim the right from common law or custom, he could obtain it only by specific grant of law. There was no such grant. The argument for the negro was made by the Supreme Court of the state in 1869, the opposing argument by one of the justices of that court in a dissenting opinion.6

⁴ S. J., 1868, p. 84.

Constitution of 1868, Art. xi, § 3.

⁸ Irwin's Code, 1868, § 1648.

⁴ Art. i, sec. 2.

⁵ This ingenious argument of intent was made by Bullock. H. J., 1868, p. 300.

White versus Clements, Georgia Reports, vol. 39, p. 232.

Such were the legal aspects of the question, which were of course less important than the political and the emotional aspects. The legislature passed upon the issue in the early part of September, 1868, by declaring all the colored members ineligible, and admitting to the vacated seats the candidates who had received respectively the next highest number of votes. If there was some legal ground for unseating the negroes, there was none for seating the minority candidates. It was done on the authority of the clause in Irwin's Code which said:

If at any popular election to fill any office the person elected is ineligible, . . . the person having the next highest number of votes, who is eligible, whenever a plurality elects, shall be declared elected.²

But this clause is found under the title "Of the Executive Department," and under the sub-head "Regulations as to All Executive Offices and Officers." Under the next title "Of the Legislative Department," there is no such provision.

For a legislature to unseat some of the elected members because on not untenable legal grounds it finds them ineligible, is not unusual. But the act of the Georgia legislature could not, under the circumstances, be regarded in the ordinary way. It showed strong racial prejudice. It was a startling breach of the system which reconstruction had been designed to institute, committed the very moment after the federal government withdrew its hand. It fixed on Georgia at once the earnest and unfavorable attention of northern public opinion. This fact enabled the Georgia Republicans to bring the federal government again to their assistance.

Their leader, Governor Bullock, at the next session of Congress (December, 1868), presented a letter to the Senate, saying that Georgia had not yet been admitted to the Union.

¹ H. J., 1868, pp. 242, 247. S. J., 1868, pp. 278, 280.

³ Irwin's Code, 1868, § 121.

She had not been admitted by the Omnibus Act, for that act provided that she should be admitted when certain things had been done, and those things had not been done. By the Reconstruction Act of Juiy 19, 1867, all persons elected in Georgia were required to take the Test Oath. The members of the present legislature had never taken it. Therefore the action which that body had taken on July 21st, regarding the Fourtcenth Amendment, was not a ratification by a legislature formed acording to the Reconstruction Acts; it was simply a ratification by a body which called itself the legislature. Hence the Omnibus Act had not yet gone into effect as to Georgia, and Georgia was not yet entitled to representation in Congress.¹

If this argument was valid in the winter of 1868, it must also have been valid in the preceding summer. Yet in July Bullock had made no objection to being inaugurated as governor of Georgia, on the ground that Georgia had not become a state. He had not refused on that ground to issue on September 10th a commission to Joshua Hill, reciting that he had been regularly elected to the Senate of the United States by the legislature of the state, and signed "Rufus B. Bullock, governor." The argument was an afterthought, not advanced until the expulsion of the negroes created a favorable opportunity for a hearing. It conflicted with the declarations and acts of the military authorities, and of the House of Representatives, but the sentiment aroused by the expulsion of the negroes was considered strong enough to sustain a repudiation of those declarations and acts.

Direct appeal to this sentiment was the auxiliary to the above argument. Bullock's letter to the Senate was accompanied by a memorial from a convention of colored men held at Macon in October. It said that there existed in Georgia

¹C. G., 40th Congress, 3d session, p. 3.

2 Ibid., p. 2.



a spirit of hatred toward the negroes and their friends, which resulted in the persecution, political repression, terrorizing, outrage and murder of the negroes, in the burning of their schools, and in the slander, ostracism and abuse of their teachers and political friends. Of this the act of the legislature was an instance and an evidence. The aid of the federal government was implored.

Similar charges had been made, it will be remembered, in the debates of 1866 and 1867. Now, however, they began to be urged with an earnestness and persistence altogether new. So conspicuous is this fact in the debates in Congress that a southern writer ironically remarks: "From this time forth the entire white race of the South devoted itself to the killing of negroes." The rest of this chapter will be devoted to considering how much truth there was in the reported abuse of negroes and "loyal" persons.

We stated in Chapter II. that after the war a bitter jealousy and animosity toward the negroes arose among the lower class of the white population, and in Chapter IV. that the restless conduct of the negroes under the influences of reconstruction filled the upper class with such alarm that they formed secret organizations in self-defence. This practice, at first supported and led by good men of the higher class, simply for defence, soon fell into the hands of the poor white class, the criminal class, and the turbulent and discontented young men of all classes, and became an instrument of revenge, crime and oppression. The change, however, was not a complete transformation. A great deal of the whipping inflicted upon negroes was bona fide chastisement for actual misdemeanors. This mode of punishment was the natural product of the transition from the old social conditions, when the negroes were disciplined by their masters,

¹ C. G., 40th Congress, 3d session, p. 3.

² Richard Taylor, Destruction and Reconstruction.

to the new conditions.¹ But besides these acts of correction many outrages were committed upon negroes, and also upon white men, simply from malice or vengeance, or other private motive.² These outrages included some homicides.³ The testimony of credible contemporaries belonging to both political parties agrees that the Ku Klux Klan and similar organizations were used only to a very small extent for political purposes.⁴

How many of these corrective or purely vicious acts were perpetrated upon negroes? Democrats of that time commonly said that the number was insignificant, that the peace was as well kept in Georgia as in any northern state, and that statements to the contrary were invented for political purposes.⁵ The number was, indeed, greatly exaggerated by Republicans, as some of the Republicans themselves admitted.⁶ Making allowance for the warping of the truth in both directions, and considering the statements of the moderate Republicans,⁷ and the admissions of some of the Democrats,⁸ remembering also the recent disbandment of the army and the disturbed conditions of society, we must conclude that the attacks on negroes, made by disguised bands and otherwise, were very numerous.



¹ K. K. R., vol. 6, p. 93 (testimony of Augustus R. Wright); p. 274 (testimony of Ambrose R. Wright); p. 236 (testimony of J. H. Christy); p. 818 (testimony of J. E. Brown).

² Ibid., vol. 7, pp. 812, 818 (testimony of J. E. Brown); p. 786 (testimony of B. H. Hill).

⁸ Ibid., vol. 6, pp. 21 (testimony of C. D. Forsythe), 118 (testimony of Aug. R. Wright); vol 7, pp. 988 (testimony of Linton Stephens), 1071.

⁴ Ibid., vol. 6, pp. 426, 440 (testimony of J. H. Caldwell), 108 (testimony of Aug. R. Wright); vol. 7, p. 818 (testimony of J. E. Brown).

bid., vol. 6, p. 344 (testimony of J. B. Gordon).

⁶ C. G., 41st Congress, 2d session, p. 1929 (Trumbull's remarks).

⁷ Report of committee on reconstruction, H. M. D., 40th Congress, 3d session, no. 52, pp. 12 (testimony of Akerman), 27 (testimony of J. E. Bryant).

⁸ K. K. R., vol. 6, p. 107 (testimony of Aug. R. Wright).

The friends of the negroes also fared badly. thropic women who came from the North to teach in the negro schools were almost invariably treated with contempt and avoided by the white people.1 This was due partly to the lingering bitterness of the war and partly to the connection of the negro schools with the Freedmen's Bureau. This institution, the office of which was to set up strangers. from a recently hostile country, to instruct the southern people in their private affairs, was in itself odious. rendered more odious by the want of intelligence and tact. and even of honesty, which is said to have frequently characterized its officers. That the hatred thus aroused should be visited upon true philanthropists who were connected with the Bureau was unfortunate, but inevitable. As for the political friends of the negroes, the "loyal" men, or in other words the white men who supported reconstruction, they were habitually treated by the Conservative press and by Conservative speakers with violent invective. Conservative editors and orators neither engaged in nor recommended the slaughter or outrage of Radicals, but by continually voicing furious sentiments, they furnished encouragement to action of that sort by men of less intelligence and selfcontrol.2

The accounts of lawlessness and persecution in Georgia, though exaggerated, undoubtedly had a substantial foundation. Whether this fact was a good argument for renewed interference in the state government by Congress is another question.

¹ K. K. R., vol. 7, p. 838 (testimony of C. W. Howard).

² This statement is corroborated by the testimony of B. H. Hill, K. K. R., vol. 7. p. 767.

CHAPTER VII

CONGRESSIONAL ACTION REGARDING GEORGIA FROM DECEM-BER, 1868, TO DECEMBER, 1869.

ON December 7, 1868, the credentials of Joshua Hill, one of the Senators elected by the Georgia legislature in the previous July, were presented in the United States Senate. Immediately the letter of Governor Bullock and the memorial of the negro convention were also presented. These documents, seconded by a speech from a Senator dwelling on the fact that Georgia was under "rebel control," secured the reference of Hill's credentials to the committee on the judiciary. This committee on January 25, 1869, recommended that Hill be not admitted to the Senate.

The reason for this recommendation, said the committee's report, was that Georgia had failed to comply with the requirements of the Omnibus Act, and so was not yet entitled to representation in Congress. The failure here referred to was not that alleged by Bullock—that the members of the legislature had not taken the Test Oath—but the failure of the two houses to exclude persons disqualified by the Fourteenth Amendment. The Omnibus Act had provided that Georgia should be entitled to representation in Congress when her legislature had "duly" ratified the Fourteenth Amendment. The word duly meant in a certain manner—namely, the manner required by the rest of the act. The

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¹ C. G., 40th Congress, 3d session, p. 2.

² S. R., 40th Congress, 3d session, no. 192. 521]

failure to exclude the disqualified members was a departure from this manner.

We saw in Chapter V. that each of the committees appointed by the Georgia legislature in July to investigate the eligibility of members was divided, that both houses voted that all were eligible in the face of detailed evidence to the contrary, that the decision of the lower house contradicted the majority of its committee, and that Meade accepted the decision rather for the sake of convenience and finality than because it was indisputably correct. On these facts and on some independent investigation the Senate judiciary committee based its belief that the legislature had failed to obey the Omnibus Act in this respect.

Trumbull, of this committee, submitted a minority report. He admitted that the decision of the legislature may have been incorrect. But he protested that if the United States government intended to regard the presence of half a dozen ineligible members in a body of two hundred and nineteen as entirely vitiating the action of the legislature, it should have taken this stand at first. If at first it had, through its representative, Meade, overlooked the irregularity as a trifle, it seemed only just to continue to overlook it, and not to make it now the occasion for augmenting the turmoil in the state by fresh interference.

But the majority rejoined that there were very good reasons for not overlooking the irregularity. It was not a mere trifling departure from the letter of the act of Congress, it was a violation of the spirit of that act. "The obvious design" of the Omnibus Act" was to prevent the new organization from falling under the control of enemies of the United States." The expulsion of the negroes showed that that design had been frustrated and that the government was under "rebel control;" it showed a "common purpose to . . . resist the authority of the United States." Moreover, the

"disorganized condition of society" in the state made it necessary for the federal government to intervene again in Georgia, not only to vindicate its law, but to preserve order.

The protest of Trumbull is significant as an early sign of the growth within the Republican party of an opposition to the prolongation of Congressional interference with the southern state governments.

The report of the judiciary committee was not acted upon, and thus the Senate avoided a categorical decision. But Hill was not admitted. A number of bills relating to Georgia were introduced; a bill "to carry out the Reconstruction Acts in Georgia" by Sumner, a bill to repeal the act of June 25, 1868, in so far as it admitted Georgia, and to provide for a provisional government in that state, by Edmunds, and others. All of these soon lapsed.

Meanwhile, in the House of Representatives the committee on reconstruction had been instructed to examine the public affairs of Georgia and to inquire what measures ought to be taken regarding the representatives of Georgia in the House.³ Many citizens of Georgia, black and white, testified before the committee.⁴ Among them Governor Bullock was conspicuous, advocating the enforcement of the Test Oath qualification—a fact which aroused great indignation in the state.

The doubtful position in which Georgia now hung raised the question, what should be done with her electoral votes in February, 1869? Congress had passed a joint resolution on July 20, 1868, to the effect that none of the states affected by the Omnibus Act should be entitled to vote in the Electoral College in 1869 unless at the time for choosing electors it had become entitled to representation in Con-

¹ C. G., 40th Congress, 3d session, p. 27.

⁸ Ibid., pp. 10 and 674. ⁴ H. M. D., 40th Congress, 3d session, no. 52.

gress. As February 10, the day for counting the votes, approached, it was considered desirable, in order that the ceremony might pass off smoothly, that the Senate and the House should agree by a special rule what should be done with Georgia's votes. Now, the Senate could not agree to a rule declaring that the votes should be counted, for that would imply that the state had become entitled to representation in Congress, and the Senate had refused to admit But the House could not concur in declaring that the votes should not be counted; for that would imply that the state had not become entitled to representation in Congress. and the House had admitted seven Representatives from the state. It was therefore agreed by a concurrent resolution passed February 8, that at the count of the electoral votes, in case the Georgia votes should be found not to affect the result essentially (which it was well known would be the case), then the presiding officer should make the following announcement:

and a similar announcement of the votes for Vice-President.^a Accordingly, on February 10, amid the wildest uproar, caused by the blunders of a perplexed chairman and the violent protest of a group of Representatives, led by Butler, against the execution of the special rule, which had been rushed through the House without their knowledge, it was announced that the electoral vote was as follows:

For Grant and Colfax

Including Georgia's votes	•	•	214
Excluding Georgia's votes	•	•	214

¹ U. S. L., vol. 15, Public Laws, p. 257.

⁸C. G., 40th Congress, 3d session, pp. 934, 976. A precedent for this rule was found in the similar treatment of Missouri's electoral vote in 1821.

For Seymour and Blair

and that in either case Grant and Colfax were elected.

On March 5, the first day of the forty-first Congress, the House of Representatives was able to get rid of the Georgia Representatives on a technicality. The same delegation which had represented Georgia since July, 1868, appeared again to finish its supposed term. Their credentials failed to state to what Congress they had been elected, but authorized them to take seats in the House of Representatives according to the ordinance of the Georgia constitutional convention passed March 10, 1868. Now, this ordinance provided that all the public officers who should be elected on April 20 should enter on their duties as soon as authorized by Congress or by the general commanding the military district, but should continue in the same as long as they would if elected in the November following.2 These Congressmen, then, were elected to serve as if elected in November, 1868, that is, they were elected members of the fortyfirst Congress. But they had already served several months in the fortieth. If they should serve through the forty-first they would exceed the constitutional term. The convention of Georgia could make the first term of all state officers longer than the regular term subsequently to obtain; it could not so lengthen the term of members of the Congress of the United States. The credentials were referred to the committee of elections, and the House was thus relieved of the presence of the Georgia representatives, which would have been an embarrassment in the subsequent proceedings.3

¹C. C. 4cth Congress, 3d session, pp. 1057, ff. ²G. C., 1867-8, p. 567.

⁸ C. G., 41st Congress, 1st session, pp. 16, 18. The committee of elections reported on Jan. 28, 1870, that the Georgia representatives were not entitled to seats in the 41st Congress, having sat in the 4cth. R. C., 41st Congress, 2d session, no. 16.

Several bills relating to Georgia were then introduced, which, though they were not advanced very far, are worth noticing. Their titles indicate the purpose "to enforce the Fourteenth Amendment." Now, the Fourteenth Amendment consists principally of prohibitions on states; it could not be enforced in Georgia unless Georgia was a state. Georgia had (it was assumed) admitted to her legislature men subject to the disqualifications of the Fourteenth Amendment, and had excluded men from the legislature on the ground of color, thus denying the equal protection of the laws to citizens. The latter act had been done after the Fourteenth Amendment went into effect (July 28, 1868²), the former before, but its effect continued. If Georgia was a state, then, she had violated the amendment, and Congress might correct these two acts by virtue of its power to enforce the amendment. If Georgia was not a state, she had not violated the Fourteenth Amendment, but her acts were subject to correction by Congress, because her government was "provisional only." If, therefore, Congress proposed to enforce the Fourteenth Amendment in Georgia, it acknowledged that Georgia was a state, and so debarred itself from any interference not necessary to enforce that Amendment. If it proposed to interfere simply as with a provisional government, there was no such limitation.

The bills of the first session of the forty-first Congress proposed to enforce the Fourteenth Amendment. To secure the enforcement of the disqualification clause they provided that each member of the legislature should be required to take an oath saying that he was not disqualified by the amendment, and that those who did not so swear should be excluded. To secure equal rights to the colored legislators they provided that all persons elected to the legislature (ac-

¹ C. G., 41st Congress, 1st session, pp. 8, 263, 591.

² U. S. L., vol. 15, appendix, p. xii.

cording to General Meade's announcement of the result of the election of 1868) who should take the test oath required should be admitted, and that the expulsion of the negroes should be declared void. The federal military authority was to assist in executing these measures if requested by the governor. These measures, it will be observed, were only such as might legally be taken regarding Massachusetts if it violated the Fourteenth Amendment.

At the next session of Congress, beginning in December, 1869, the policy of enforcing the Fourteenth Amendment was abandoned for the alternative policy of legislating for a provisional government. The reason for the change was an emergency in which the Republican Politicians found themselves. In the previous February Congress had passed the joint resolution proposing the Fifteenth Amendment. By December it seemed certain that the number of ratifying states would fall short of the required three-fourths by just one, unless Congress could prevent it.1 Georgia furnished the means of preventing it. In March her legislature had rejected the proposed amendment.* It could now be forced to ratify and thus complete the necessary majority. Georgia must then be treated not as a state which had violated the Fourteenth Amendment, but as a provisional organization subject to the uncontrolled will of Congress. A bill was accordingly prepared containing the same provisions as the bills of the preceding session, but adding this clause: "That the legislature shall ratify the Fifteenth Amendment before Senators and Representatives from Georgia are admitted to seats in Congress." In accordance with its different legal basis the bill was entitled: "An act to promote the reconstruction of the state of Georgia."

Little need be said of the manner in which this bill was

¹ W. A. Dunning, The Civil War and Reconstruction, pp. 226-228, 243.

⁹ S. J., 1869, p. 806; H. J., p. 610.

passed. The usual partisan abuse prevailed on both sides. The Democrats made a remarkable opposition, led by Beck of Kentucky. The Republicans were aided by a message from President Grant urging the intervention of Congress,* by the report of the reconstruction committee on affairs in Georgia,3 and by a report from General Terry, who was stationed in the Department of the South, alleging that disorder was rampant in Georgia and the need of further military government by federal authority imperative.4 Terry's superior officer, General Halleck, added a postscript to Terry's report to the effect that Terry was mistaken, that the disorder in Georgia was much less than was commonly believed, and that federal interference was highly inadvisable.5 Aided by the report and undeterred by the postscript, the Republicans discoursed of "rebel control" and "murder" with unprecedented effect. Butler said that Congress must act instantly; if action on the bill is postponed, he said, "the rest of the Republican majority of that state may be murdered, even during Christmas week, when the Son of God came on earth to bring peace and good will to man."6

The bill became law on December 22, 1869.7 Congress thus decided at last to adopt the opinion of the Senate judiciary committee, that Georgia had not become a state through the Omnibus Act. General Meade, in declaring the contrary, had been mistaken. Bullock, in calling himself governor, had been mistaken. The House of Representatives, in admitting members sent from Georgia, had been

¹ C. G., 41st Congress, 2d session, p. 251.

² Ibid., p. 4.

⁸ H. M. D., 40th Congress, 3d session, no. 52.

⁴ S. D., 41st Congress, 2d session, no. 3.

⁵ Ibid. Halleck's annual report of Nov. 6, 1869, speaks to the same effect. R. S. W., 1869, abridged edition, p. 70.

⁶C. G., 41st Congress, 2d session, p. 246.

⁷ U. S. L., vol. 16, Pub. Laws, p. 59.

mistaken; they were *de facto* members, but had no legal right there.¹ The legal basis of the act of December 22 was then the same as that of the original Reconstruction Acts.

The question which had been raised in the debates on these acts—What legal effect could the action of a body not the legislature of a state have on the adoption of an amendment to the constitution?—was raised again here. Some of the Republicans argued that such action could have no effect and should not be required. Under these circumstances there was a more earnest effort than any heretofore made to defend such a requirement. It was answered: True, the body which will ratify the amendment in Georgia will not be a state legislature at the time; but it will later become a state legislature, and then by relation the ratification will be intputed to the state legislature and will thus have legal effect. Relation, an operation known to private law, had been applied to constitutional law in several previous cases, in order to give to acts done by the legislatures of territories the same effect as if they had been done after statehood was of obtained.3 The ratification by Georgia would be valid by relation.4

¹ C. G., 41st Congress, 2d session, p. 1710 (Lawrence's speech).

³ Ibid., pp. 165 (Carpenter's speech) and 208 (Conkling's speech).

³ C. G., 41st Congress, 2d session, p. 2062.

⁴ Ibid., p. 1710 (Lawrence's speech).

CHAPTER VIII

THE EXECUTION OF THE ACT OF DECEMBER 22, 1869, AND THE FINAL RESTORATION

BEFORE relating the manner in which the act of December 22, 1869 (which we shall call the Reorganization Act), was executed, we must mention its provisions in more detail than we did in the last chapter. It first "authorized and directed" the governor by proclamation to summon "forthwith" all persons elected to the legislature in April, 1868, according to Meade's announcement of the result of the election then held, to meet in special session "on some day certain." The act continued:

and thereupon the said general assembly shall proceed to perfect its organization in conformity with the Constitution and laws of the United States, according to the provisions of this act.

When the legislature was assembled, every person claiming to be a member should take a test oath prescribed in the act, to the effect that he had never been a member of Congress or of a state legislature, nor held any civil office created by law for the administration of any general law of a state, or for the administration of justice in any state, or under the laws of the United States, nor served in the military or naval forces of the United States as an officer, and thereafter engaged in or supported hostilities against the United States; each person should take this oath or else an oath (also prescribed verbatim) that he had been relieved from disability by Congress according to section 3 of the

¹ G. O. T. M. D., 1868, no. 90.

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Fourteenth Amendment. The exclusion on the ground of color of any person elected and otherwise qualified, the act declared "would be illegal and revolutionary," and was "prohibited." The act directed the President to use force in executing the act upon application from the governor.

The process ordered by the act seems simple and obvious, but the general of the army deduced much from it not apparent on its face. This act, he reasoned, implies that the Georgia government is provisional, and has never ceased to be so since March 2, 1867. And in that case the act of March 2, 1867, has never ceased to operate as to Georgia, since by its own terms it is to remain in force in each "rebel state" until each respectively has been "by law admitted to representation in the congress of the United States." Georgia has not been so admitted, since she did not comply with the Omnibus Act. Therefore the Reconstruction Acts are still in force in Georgia, and the general orders of July 28, 1868, declaring the Third Military District abolished were a mistake. Accordingly those orders were countermanded by the general of the army on January 4, 1870, and General Terry, a prominent advocate, as we have seen, of the revival of military government in Georgia, was placed in command of the remnant of the Third Military District.²

The War Department's deduction from the Reorganization Act of authority to institute again the system of the Reconstruction Acts came a month or two later under the consideration of the Senate judiciary committee, and was pronounced a gratuitous perversion of the act last passed. That act implied, to be sure, that the Georgia government was provisional; but it was plainly intended not to revive but to supersede the former regulations regarding that government. The purpose of the Reorganization Act was simply that the

¹ G. O. H., 1870, no. 1. This and other documents relating to Terry's administration are published in E. D., 41st Congress, 2d session, no. 288.

legislature should reorganize itself and ratify the Fifteenth Amendment. To this purpose military government had no relation. The Reconstruction Acts had not expired according to their own provisions as to Georgia, it was true, but they had been repealed by the Reorganization Act. This was further proved by the latter's provision that military force should be used "upon the application of the governor." The Reorganization Act, said the committee, "invokes military action in what it provides shall be done, and no more." Unfortunately this opinion was delivered some time after the theory which it demolished had been in practical operation.

Terry, having received the rôle of military governor, played it as the true heir to the power of his great predecessors. He removed from office three sheriffs and a county ordinary and appointed successors.* He intervened in eight private controversies and composed them with a strong hand.³ In two cases before the state courts he substituted his command for the regular process.⁴ Still more apparent was the official character which he had assumed, in his conduct toward the legislature. Possessing the power wielded by Pope and Meade, he could issue any orders he pleased to that body. For this reason, and because he was in sympathy with them, the Georgia Republicans ardently embraced and tenaciously clung to the theory that he was not a mere assistant in executing the Reorganization Act, but a military governor under the Reconstruction Acts.

On December 22, 1869, Governor Bullock issued his proclamation (which he signed "Rufus B. Bullock, Provisional Governor"), summoning the men elected to the legislature in 1868 to meet in Atlanta on January 10 following.⁵ This

¹ S. R., 41st Congress, 2d session, no. 58.

² G. O. M. D. G., 1870, no. 2, 14, 16, 17.

⁸ S. O. M. D. G., no. 4, 5, 6, 8, 9, 11, 14, 17.

⁴ Ibid., no. 10 and 11.

⁶ H. J., 1870, p. 3.

duty, besides that of calling on the President for aid if he saw fit, was the only one expressly entrusted to Bullock by the Reorganization Act. Another one, however, was deduced by the following process of reasoning: The legislature can do nothing before its members are qualified according to the Since it can do nothing, it cannot even organize itself. But it is the purpose of the act that the legislature be organized. Therefore some one else must be intended to organize This duty naturally belongs to the governor, since the cognate duty of convening the body is imposed on him. accordance with this reasoning, Bullock appointed a temporary clerk for each house, who should call the house to order and preside until all the members should be qualified or declared disqualified, by taking or failing to take one of the test oaths of the Reorganization Act. This appointment of Bullock rested not only upon the reasoning stated above, but upon the approval of Terry, who, whether the reasoning was correct or not, could do, or order to be done, to the legislature anything he chose.2

When the legislature convened on January 10, each house was called to order by its temporary clerk, who proceeded to call the roll of names announced by Meade after the election of 1868, for the administration to each person of one of the required test oaths. On the same day the upper house completed the roll call and the swearing in of members, and effected a permanent organization. A Republican (Conley) was elected president by a large majority. On assuming the chair he delivered an oration, the spirit of which may be perceived from the following sentence: "The government has determined that in this republic, which is not, never was, and never can be, a democracy—that in this republic Republicans shall rule."

⁸ S. J., 1870., p. 26.

¹ H. J., p. 17.

¹ S. J., 1870, p. 3; H. J., p. 7.

Far different was the course of events in the lower house. When that house assembled it found one Harris in the chair. Forgetting that his appointment had been indorsed by Terry and that he was, therefore, the virtual agent of a military governor who had the power to do anything he chose to the legislature, the Conservatives raised objection to his presiding and attempted to elect a temporary chairman in the usual way. This attempt precipitated a violent scene in the house, but was unsuccessful. Harris kept his seat and ordered the roll call for the swearing in of members to proceed. The names of seventy-eight persons were called and as many of these as were present were sworn in. this point, the journal records, "the clerk pro tem. announced that the house would take a recess" until the next day. This the house did. On January 11 and 12, the same proceedings occurred, the swearing in continuing until it was suspended and the house adjourned by the "clerk pro tem."2

Without the theory that the Reconstruction Acts were still in force these proceedings in the lower house would have constituted the plainest illegality. But if Terry was a military governor and Harris his agent, they were legal. Though the Senate judiciary committee later declared this a false interpretation of the law, yet it was the official interpretation of the War Department, as we saw by the order appointing Terry.³ The War Department had a right to decide what the Reorganization Act, which it was to aid in executing, meant. Its decision, whatever its character, was never officially overruled. Therefore the proceedings in the legislature were officially regular.

Before the legislature met, the Conservative papers had published an article by a state judge on the meaning of the first test oath of the Reorganization Act. It concerned

See also a letter from Sherman to Terry, published in K. K. R., vol. i, p. 311.

especially the phrase: "any civil office created by law for the administration of any general law of a state." It was argued that there were many state offices not included in this phrase—among them those of mayor, alderman and state Since these offices were not "for the administration of any general law," but only for that of special or local law, former occupants of them who had supported the Confederacy could take the present test oath.1 This construction would give an advantage to the Conservatives. counteract it, Bullock applied to the attorney general for an official interpretation. That officer (Farrow by name) responded with a very reasonable opinion. He admitted that officers with merely local functions were not included in the phrase in question, but pointed out that many municipal officers had the powers of a justice of the peace. In such cases they were charged with the administration of general law and were included in the phrase. The state librarian, said Farrow, executed general law and was included.*

After the swearing in of members had gone on in the house of representatives, as we have said, it was believed by the Radicals that some Conservatives were acting upon the judge's interpretation and disregarding the attorney general's, and that others had sworn or intended to swear falsely who were debarred even by the former. Ordinarily, if a man intends to swear falsely to a test oath there is no way of preventing him. In the existing state of public opinion, prosecution for perjury after the oath of office was taken was impossible. But Georgia had a military governor. By issuing orders he could prevent men whom he believed ineligible from swearing and could unseat those whom he believed to have sworn falsely. This Terry decided to do.

On January 13 he detailed a board of soldiers to investigate the cases of twenty-one members elect whose eligibility

¹ Judge Cabaniss in Atlanta Constitution, Jan. 8, 1870. ² H. J., 1870, p. 9.

was questioned. This board sat for two weeks, and found five men ineligible 2 and eleven eligible.3 Terry accordingly forbade the five, and ordered the eleven, to be sworn in. The remaining five of the twenty-one, together with nineteen others, confessed ineligibility by filing with Bullock application for the removal of their disabilities by Congress. also Terry forbade to be sworn in.4 The actions and the decision of the board of inquiry were pronounced fair and honorable even by the Conservatives.5 The nineteen applications for Congressional grace were said to have been procured by the Radicals through intimidation and fraud.6 the applicants were in fact ineligible but intended nevertheless to take the oath, then we must admire the cleverness of the Radicals in dissuading them, by whatever means they did it. If they used intimidation and fraud, their means were no worse than the end sought by their victims—the frustration of a law by perjury. On the other hand, if nineteen Conservatives who were eligible were induced by Radicals to petition for the removal of ineligibility, the fact may excite disapproval of the Radicals, but hardly pity for the Conservatives.

On January 13, when the board of inquiry was appointed, the "clerk pro tem." of the lower house, by order of Bullock countersigned by Terry, had declared the house adjourned till January 17, to await the decision of the board. On the 17th the house met and listened to the reading of two orders from Bullock indorsed by Terry; the one directing the state treasurer to issue fifty dollars to each member of the house,

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<sup>1</sup> G. O. M. D. G., 1870, no. 3 and 4.
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² Ibid., no. 9 and 11.

⁸ Ibid., no. 9.

^{4 /}bid., no. 9 and 11.

Atlanta Constitution, Jan. 27, 1870.

⁶ C. G., 41st Congress, 2d session, p. 1926 (Trumbull's speech).

⁹ H. J., 1870, p. 22.

the other ordering the house to adjourn till January 19.2 On the 19th the house met, and after one man had been sworn in was adjourned in the same manner till the 24th. On the 24th it met and after two men had been sworn in was again adjourned by order of the governor.3 On the morning of the 25th it met and was adjourned till afternoon. the afternoon it was adjourned as soon as it had met till the next day. To the countersignature of Terry in this case was added the promise that this was the last adjournment of the series, since the board had now rendered so much of its decision as related to members of the lower house. was therefore ordered to swear in, on the next day, all the remaining members elect except those found or confessed ineligible, and to elect its permanent officers.4 On January 26 this order was complied with; the Radical candidate for chairman was elected by a large majority, and the redoubtable "clerk pro tem.," having presided for the last time, retired.5

The reorganized legislature on February 2 complied with the remaining requirements of the Reorganization Act by ratifying the Fifteenth Amendment. On the advice of Bullock it also repassed the resolutions of July, 1868, required by the Omnibus Act. This was not necessary to re-admission. It is true, the requirements of the Omnibus Act had, by the hypothesis of the Reorganization Act, never been "duly" fulfilled. But the Omnibus Act had been superseded by other legislation, which made new requirements and did not renew the old. The renewal of the unfulfilled requirements had been discussed in Congress and rejected.6 Nevertheless, the resolutions were passed gratuitously.7

The Omnibus Act had definitely said that Georgia should

⁶ C. G., 41st Congress, 2d session, p. 208.

⁷ S. J., 1870, p. 74; H. J., p. 74.

be "entitled and admitted to representation in Congress as a state of the union when the legislature" had complied with the conditions mentioned in the act. The Reorganization Act was not so definite. It said; "The legislature shall ratify the Fifteenth Amendment . . . before Senators and Representatives from Georgia are admitted to seats in Congress." This might be construed as granting title to representation as a state as soon as the Fifteenth Amendment should be ratified, or as merely requiring the ratification and making no definite provision as to restoration but leaving that subject to be provided for by another act. The latter construction was adopted by the Georgia Radicals, since it prolonged the tenure of their military governor. It followed from this construction that the state government was still "provisional" and could not proceed with its business like a regular state government. So after electing United States Senators (the election of July, 1868, being regarded as invalid,1 and the present election probably being designed to become valid by relation), the legislature adjourned until April 18, to await Congressional action. In April Congress had taken no action, and the legislature, after sitting a fortnight, took another recess of two months.3 Meantime the theory of military government had been faithfully observed. the legislature was only provisional, it could legislate with Terry's permission. It passed a stay law on February 17, and asked Terry to enforce it.4 On May 2 it passed revenue and appropriation acts,5 but not before Terry had informed it through the governor that he would allow those acts to have the validity of regularly issued military orders.6

Whatever may have been the merits of the construction of

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<sup>1</sup> See Bullock's message, H. J., 1870, p. 52.
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4 /bid., p. 140.

4 *lbid.*, p. 121.

² H. J., 1870, p. 95.

¹ lbid., pp. 113, 156.

⁴ H. J., 1870, p. 106.

the Reorganization Act adopted by the War Department, it is certain that the proceedings taken under it greatly astonished those who had passed the act. On January 19 the House of Representatives adopted a resolution requesting the general of the army to inform it by what authority three United States soldiers were acting as a committee in the legislature of Georgia. On February 4 the Senate asked for official information regarding the proceedings had under the Reorganization Act.² The facts disclosed in response to this request created such surprise that the Senate directed the judiciary committee to inquire and report whether the act had been complied with.3 The answer of the committee. as we saw in the early part of the chapter, was that the act had been misconstrued and violated. The appointment of presiding officers by the governor, the acts of those officers. the revival of the military governorship, and in particular the interference of Terry in the organization of the legislaturethese, said the committee, were wholly unlawful. But though unlawful they had resulted in no substantial injustice, since all the men debarred by Terry were undoubtedly ineligible. And in any case a general state election was approaching. so that if any injustice had been done it would soon be righted. For these reasons the committee recommended that Congress undertake no more legislation for Georgia, but admit her representatives to each house as soon as possible.4

The committee believed that the Reorganization Act was to be construed as a law entitling Georgia to representation in Congress as soon as she had ratified the Fifteenth Amendment. This opinion was held by many Republicans, who had followed Trumbull's example and who appeared from

¹ C. G., 41st Congress, 2d session, p. 576. For Sherman's reply see E. D., 41st Congress, 2d session, no. 82.

² C. G., 41st Congress, 2d session, p. 1029.

⁸ Ibid., p. 1128.

⁴ S. R., 41st Congress, 2d session, no. 58.

this time on as opponents of further Congressional interference in the South. The radical Republicans, however, led by Butler—those Republicans characterized by a Republican paper of the time as "the screeching wing" of the party!—insisted that Georgia must be admitted, as the first Reconstruction Act had said, "by law," and that no law to that effect had been passed. The reason why this argument was urged was that the passage of a new act for restoring the state would give an opportunity to annex other provisions besides the declaration of restoration. The particular provisions designed to be annexed were for the purpose of prolonging the term of the present state government.

On February 25 Butler introduced the bill to admit Georgia. One of its sections was as follows:

That the power granted by the constitution of Georgia to the general assembly to change the time of holding elections . . . shall not be so exercised as to postpone the election for members of the next general assembly beyond the Tuesday after the first Monday in November in the year 1872.

The power here referred to was that conferred by Article III., section 1, of the state constitution;

The election for members of the general assembly shall begin on Tuesday after the first Monday in November of every second year . . . but the general assembly may by law change the time of election, and members shall hold until their successors are elected and qualified.

The constitutional term of the present legislature (except of one-half of the senators, who held four years) would expire in November, 1870. But this section of the constitution, Butler pointed out, would enable the legislature to postpone the election and perpetuate its power. This grave danger he proposed to remove by the clause of his bill above quoted. In order to prevent the legislature from prolonging its tenure forever, he proposed, not to forbid prolongation, but to allow it for two years.

¹Chicago Tribune, Dec. 7, 1868.

² C. G., 41st Congress, 2d session, pp. 1570, 1704.

I also propose [he said] by this [clause] to give to the present State officers of Georgia a two years' term of office in that state as a state in this Union.

That Congress should pose as the defender of the people of Georgia against a usurping legislature, and at the same time by the guaranty of its approval encourage that legislature to double its constitutional term—this was a conception of political genius which, independently of its realization, should make Butler immortal.

The moderate Republicans of the House of Representatives were willing, for the sake of settling doubt, to pass a bill declaring Georgia restored, but were decidedly opposed the scheme to use the bill as a means of prolonging the tenure of the Georgia Radicals. An admendment to Butler's bill, known as the Bingham amendment, was offered, to the following effect:

. . . neither shall this act be construed to extend the official tenure of any officer of said state beyond the term limited by the constitution thereof, dating from the election or appointment of such officer.¹

The bill with this amendment passed the House by a large majority on March 8.2

In the Senate the necessity of any bill and the propriety of the Bingham amendment were warmly debated for some weeks. Then the so-called Drake amendment was offered. It provided that whenever the legislature or governor of any state should inform the President of the existence within that state of associations organized for the purpose of obstructing the law and doing violence to persons, then the President should send troops to that state, declare martial law, suspend the privileges of the writ of habeas corpus, and take such other military measures as he saw fit, and should levy the cost of the expedition on the people of the state.³ The propriety of grafting this general measure on a special bill like the present should not be discussed, it was said, in view of

¹ C. G., 41st Congress, 2d session, p. 1770. ² Ibid. ⁸ Ibid., p. 1988.

the pressing necessity of passing it in some way, no matter how. The debate thus complicated continued until April 19, when the bill went to the committee of the whole. There, the night being far spent, two entirely new amendments were suddenly offered. One commanded Georgia to hold a general election in the present year; the other declared that the existing government of Georgia was still "provisional" and provided that the Reconstruction Acts of 1867 should continue to be enforced there. These amendments were adopted by the committee. The Drake amendment was also adopted. Finally, the entire bill as it came from the house was stricken out. Thus transformed so that, as a Senator said, "it would not be recognized by the oldest inhabitant," the bill was passed by the Senate.

The House of Representatives did not take up the bill again until June 23. On June 24 it decided to insist on the passage of the bill substantially as before passed. As a result of the conference following, the Senate yielded to the House. The bill became law on July 15, 1870. It said:

. . . It is hereby declared that the state of Georgia is entitled to representation in the Congress of the United States. But nothing in this act contained shall be construed to deprive the people of Georgia of the right to an election for members of the general assembly of said state, as provided for in the constitution thereof.⁵

One would suppose that this act of July 15 should close the chapter; that it recognized Georgia as a state, and that henceforth all peculiar relations between Georgia and the federal government were at an end. The Georgia Radicals were able to avoid this conclusion. In a message to the legislature on July 18 the governor said that according to the act of March 2, 1867, the federal military power was to re-

¹C. G., 41st Congress, 2d session, p. 2091.

³ Ibid., p. 2829.

⁸ U. S. L., vol. 16, Public Laws, p. 363.

² Ibid., pp. 2820, ff. ⁴ Ibid., p. 4747.

main until the state was not only entitled to representation but actually represented in Congress. Section 5 of that act contained this language:

When . . . any one of said rebel states shall have [fulfilled all requirements], said state shall be declared entitled to representation in Congress, and Senators and Representatives shall be admitted therefrom . . . and then and thereafter the preceding sections of this act shall be inoperative in said state.

Hence, the military authority, said Bullock, would continue in Georgia until the following December. But he informed the legislature that it might proceed with legislation, since Terry had informed him that he would allow it.

The Radicals in the legislature took advantage of the theory announced by the governor to make one last attempt at prolongation of power. On July 26 a resolution was offered in the upper house to this effect: That the authority of the United States was still paramount in Georgia; that no offence ought to be offered to Congress by an apparent denial of this fact; that therefore no election should be held in the state until Congress had fully recognized its statehood by receiving its representatives. On July 29 the senate adopted a resolution similar to this, but the lower house rejected it by a few votes. With the failure of this attempt, the Reconstruction Acts ceased to operate in Georgia, either in fact or in any one's theory.

At the next session of Congress a delegation from Georgia composed of men elected in December, 1870, was seated in the House of Representatives.⁴ In the Senate, Farrow and Whitely, elected by the legislature in February, 1870, presented credentials. They were referred to the judiciary committee, which reported adversely. It recommended that Hill, elected in 1868, be seated, and reported that Miller,

¹ H. J., 1870, p. 181.

² S. J., 1870, vol. ii, p. 29.

⁸ Ibid., p. 50; H. J., p. 343.

⁴ C. G., 41st Congress, 3d session, pp. 527, 530, 678, 703, 1086.

elected with Hill, would be entitled to a seat except that he was unable to take the Test Oath required of members of Congress by the act of July 2, 1862. Since this committee had decided in January, 1869, that the Georgia legislature was not legally organized in 1868, and in March, 1870, that its organization in January of that year was also illegal, and since therefore the election of Hill and Miller and that of Farrow and Whitely were both illegal, the committee had to decide the question: To which of these illegal elections ought we to give de facto validity? It decided in favor of the earlier one on grounds of equity. The Senate adopted the committee's opinion. The Test Oath act was suspended in favor of Miller by a special act of Congress, and he and Hill were sworn in, in February, 1871.

Thus, after federal intervention had been imposed in 1865 and apparently withdrawn in the same year, again imposed in 1867 and again apparently withdrawn in 1868, and yet again imposed in 1869, it was now withdrawn for the last time, and Georgia was completely restored to statehood.

¹S. R., 41st Congress, 3d session, no. 308.

² C. G., 41st Congress, 3d session, pp. 871, 1632.

CHAPTER IX

RECONSTRUCTION AND THE STATE GOVERNMENT.

In the preceding chapters we have mentioned the immediate effect of reconstruction upon social conditions. To its immediate effects upon political conditions, in other words to the character and conduct of the new state government, which have been mentioned only incidentally, we shall now give a more direct and consecutive consideration.

With reference to the political reforms of reconstruction the white men of Georgia formed three distinct parties. There were those who favored them, either on their ethical and political merits or (more often) as a means of attaining political power otherwise unattainable. They were called Scalawags, Carpet-baggers and Radicals, of which terms we we shall adopt the last. There were those unalterably opposed to them, called Rebels by their critics and Conservatives by themselves. There were, thirdly, those who supported them not upon their merits, which they doubted, but because they saw the state at the mercy of a conqueror and believed that, bad as the measures were, it was better to accept them quickly than to make a vain resistance, which could only prolong the social and commercial disturbances in the state, and which might occasion the administration of a still worse dose. This group embraced many of the commercial class, which was especially large in Georgia, and one of the men prominent in former politics, namely Governor Brown. They were classed by the Conservatives with the basest of Radicals, but we shall call them the Moderate Republicans. The admixture of this group with the Radical

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party had important consequences. Differing from their party in principle and allying themselves with it to bring peace to the state, when the peace of the state seemed secure, they sometimes adhered to their principles rather than to their party. It is true, many of them became so interested in the great game of politics then going on that they played it for its own sake; but some party splits of importance occurred.

The first fruit of the policy of negro enfranchisement and rebel disenfranchisement was the constitutional convention of 1867-68. It was stated in the latter part of Chapter IV. that in the election for members of this convention many Conservatives declined to take part. For this reason the Radicals obtained a predominance in the convention which they did not retain in the state government after the Conservatives decided to fight. The convention, in fact, was extremely Radical. The constitution which it framed shows the thoroughness with which it entered into the Humanitarian reforms. The speeches and resolutions show that a close sympathy with the Republican party and a bitter antagonism to the Conservatives were entertained by most of the members. The temporary chairman, Foster Blodgett, in his opening speech, mentioned the suspicious, hostile and contemptuous attitude of the Conservatives toward the convention. He said:

They may stand and rail at us and strive to distract us from our patriotic labors; but we are engaged in a great work . . . we are building up the walls of a great state.¹

Parrot, the permanent chairman, said:

Many of us come here from amongst a people who have spurned us and spit upon us . . . the enemies of the convention are watching with envious eyes to see whether we shall be able to meet public expectation . . . We should form a state government for an unwilling people based upon the soundest principles . . . and in governing them rescue human liberty from the grave, and prevent them from trampling us under foot.

On the other side, he said:

¹ J. C., p. 14.



The Republican party of the nation is waiting with intense anxiety the movements of this body. Our friends will soon be able to determine whether we shall be a burden upon them . . . or sid them in the great work of restoring our state.

When Governor Jenkins brought suit against Stanton on behalf of the state, the convention declared the action unauthorized and in the name of the people of Georgia demanded that the suit be dismissed. On December 17, 1867, a resolution was passed, asking Pope to appoint, in lieu of Governor Jenkins, a provisional governor, and asking that the person appointed be Rufus B. Bullock. Unsuccessful here, the convention tried again on January 21. It requested Congress to allow it to vacate the governorship and all other offices now filled by men unfriendly to reconstruction and to fill them with new appointees. These two last named resolutions suggest not only Radical sentiment, but also Radical organization in the convention.

The attitude of the convention toward the military authorities was most cordial. On December 20, a reception was given to Pope. The general made a speech and received an ovation.⁵ Resolutions of friendship and gratitude were voted him on his departure.⁶ Meade, on his arrival, received resolutions of welcome,⁷ and resolutions of friendly import on various other occasions.⁸ Meade did not entirely reciprocate this cordiality.

Toward Congress the convention was not only cordial; it was almost filial. Not only was the United States government eloquently thanked for its magnanimity, but it was appealed to by the convention as a kind parent by a child confident of favor. It was petitioned to appropriate thirty million dollars to be loaned on mortgage to southern

planters; to loan a hundred thousand dollars to the South Georgia and Florida railroad, and "to make a liberal appropriation" for building the proposed Air Line railroad.³

The constitutional convention of 1865 had met on October 25, and adjourned on November 8, thus completing its work in fourteen days. This dispatch, as well as the style of its resolutions and of the speeches of its members,4 had marked it as a body where good taste, decorum and public spirit prevailed.

The reconstruction convention met on December 9, 1867. and continued in session (excepting a recess from December 24 to January 7), until March 11, 1868. The first article of the new constitution on which the convention took action was reported on January 9.5 Before that time many resolutions and ordinances were introduced. Most of them related to "relief" (such as suspension of tax collections, homestead exemption, stay of execution for debt, etc.), or to the pay and mileage of delegates, and only rarely was anything said about the constitution. On December 16 the more conscientious members secured the appointment of a committee to inquire whether the convention had power to do any business besides frame a constitution.6 This committee did not discuss the law of the question, but recommended on moral grounds a resolution to this effect:

That all ordinances or other matter . . . already introduced and pending are hereby indefinitely postponed; and in future no ordinance or other matter . . . not necessarily connected with the fundamental law shall be entertained by this convention [except relief legislation].

This report met with vigorous opposition. It was saved from the table by two votes. But it was adopted.⁷ The

contemporary Conservative press describes the convention as very infamous and very disgusting. It contained thirty-three negroes, and the transactions recorded in the official journal show that it was composed largely of men of low character.

Hence, to many of the delegates, framing the constitution was only a minor incident of the convention, and the main part of that work was left to a small number of men. Their work shows intelligence and ability. Moreover, in the records of the convention there are not wanting traces of that undoubted public spirit which animated many of the supporters of reconstruction—the honest desire to repair and develop the material welfare of the state. This spirit is evident in the speeches we have cited, and in some of the resolutions.

We have stated how the campaign of 1868 resulted in giving the governorship to the Republicans and a majority of twenty-nine in the legislature to the Conservatives; how Governor Bullock tried to reduce that majority through Meade, and how Meade refused his aid; and how the majority was more than doubled by the expulsion of the negroes and the seating of the minority candidates. From that time to the reorganization of the legislature in 1870, the most remarkable fact in the state politics was the hostility between the governor and the legislature.

After the expulsion of the negroes, the lower house asked the governor to send it the names of the candidates who at the election had received the next highest vote to the persons expelled. The governor sent the names and with them a long protest against the expulsion of the negroes.² The house, on hearing the message, adopted a tart resolution, reminding the governor that the members of each house

¹ M. F. U., Dec. 24, 1867, Jan. 7, Jan. 14, 1868.

³ H. J., 1868, p. 294.

were "the keepers of their own consciences, and not his Excellency." A similar message to the upper house in response to a similar request provoked a similar resolution, which was defeated by two votes.²

It will be remembered that in December, 1868, and January, 1869, the governor urged upon Congress, through his letter presented in the Senate, and through his testimony before the Reconstruction Committee, the theory that Georgia had not yet been restored. On January 15, 1869, he urged the same view upon the legislature. He advised it to reorganize itself by summoning all men elected members in 1868, requiring each to take the Test Oath, excluding only those who should not take it, and thus constituted to repass the resolutions required by the Omnibus Act. legislature did not do this, it must submit to Congressional interference.3 This message apparently caused the legislature some apprehension. It adopted a joint resolution to the effect that it desired the question of the eligibility of negroes to office to be determined by the supreme court of the state. The governor sent this resolution back with one of his admirably keen and powerful messages. He said that Congress had two grievances against the present legislature; that it had admitted members disqualified by the Fourteenth Amendment, contrary to the Omnibus Act, and that it had expelled twenty-eight negroes. The present resolution, intended to appease Congress, ignored the first grievance and proposed no remedy for the second; therefore it was meaningless and absurd.4

On January 21, 1869, the state treasurer, Angier, in response to an inquiry from the house of representatives regarding the affairs of his department, intimated that the governor had drawn money from the treasury under suspi-

¹ H. J., 1868, p. 303.

³ H. J., 1869, p. 5.

cious circumsances.¹ Thus began the feud between the governor and the treasurer which continued during the rest of Bullock's term. Angier's report was referred to the committee on finance. The majority of the committee reported that the governor's acts had been irregular but in good faith. The minority reported that his acts were culpable and his explanations inadequate, and concluded: "The facts herein set forth develop the necessity for further legislation for the security of the treasury." This report the house adopted by a large majority.³

Another index of the relations between the governor and the legislature is furnished by the governor's message submitting the proposed Fifteenth Amendment. It opened thus:

It is especially gratifying to learn, as I do from the published proceedings of your honorable body, that senators and representatives who have heretofore acted with a political organization which adopted as one of its principles a denunciation of the acts of a Republican Congress . . . should now give expression to their anxious desire to lose no time in embracing this opportunity of ratifying one of the fundamental principles of the Republican party . . . and I very much regret that the preparation necessary for a proper presentation of this subject to your honorable body has necessarily caused a short delay, and thereby prolonged the suspense of those who are so anxious to concur.

The radicals probably desired the rejection of the amendment, since it would furnish another strong argument to Congress in favor of reorganizing the legislature. Hence, the Radical governor, as his message shows, did not do his best to induce the legislature to ratify, and probably some Radical members for the same reason voted against the amendment or refrained from voting for it. It was defeated in the lower house on March 12,5 and in the upper on March 18.6

In the last chapter we saw that Terry excluded five men

 from the legislature because the board of inquiry had found them ineligible, and excluded nineteen others because they had failed to take the required oath, and had applied to Congress for removal of disabilities. It is safe to assume that all of these twenty-four men were conservatives. Nineteen of them had been elected to the lower house, five to the senate. Immediately after organization, on advice of Bullock and with the sanction of Terry, the senate gave the five vacated seats to the minority candidates, and the house gave fourteen of its vacated seats to the minority candidates. The result was that the Republicans secured a majority in each house. The Republican control thus secured remained

⁸ H. J., pp. 34, 40, 84, 88.

⁶The complexion of the legislature when composed of the men elected in April, 1868, was as follows:

	Senate.	Lower House.
Republicans	22	73
Conservatives	22	102

After the colored members were expelled and their seats given to the minority candidates, it was as follows:

	Schate.	Lower House.
Republicans	19	48
Conservatives	25	127

After the reorganization of 1870 it was as follows:

	Senate.	Lower House,
Republicans	27 17	8 ₇ 8 ₃

The figures in the second and third tables are based upon the changes produced

¹G. O. M. D. G., 1870, no. 9 and 11.

² S. J., 1870, p. 39.

uninterrupted for the remainder of 1870. Perfect accord now existed between the governor and legislature, and in the quarrel between Bullock and Angier, which went on with increased acerbity in the press and before a congressional committee, the legislature proceeded to transfer its support to the governor.

But Republican supremacy was in danger. It was threatened by the Moderate Republicans. J. E. Bryant, a Republican, prominent in the state politics since the beginning of the new rigime, in testifying before the Reconstruction Committee in January, 1869, had advocated reorganization of the legislature, but had opposed any other interference, especially the restoration of military government.3 He and other Republicans who shared his opinion were disgusted with the proceedings of Bullock and Terry. As early as January 12, 1870, there were reports that the Radicals were apprehensive of a combination between the Moderate Republicans and the Conservatives.4 Probably the strenuous efforts of the Radicals to take and make every possible advantage for themselves in the reorganization is partly accounted for by this apprehension. On February 2, Bryant caused to be entered on the journal of the house of representatives a protest denouncing the reorganization proceedings as illegal.5 Shortly afterwards he published a statement of his position. He said that he was a Republican, but was opposed to the corrupt ring which controlled the party in Georgia.6 From

only by the official transactions referred to. Perhaps some slight corrections might be made on account of accidental circumstances, such as the non-attendance or death of a few members.

¹ See K. K. R., vol. 6, p. 149; vol. 7, p. 1062.

³ H. J., 1870, p. 156.

⁸ H. M. D., 40th Congress, 3d session, no. 52, p. 27.]

⁴Savannah News, Jan. 12, 1870.

⁶ H. J., p. 50.

⁶ M. F. U., Feb. 15, 1870

this time on the papers frequently referred to the alliance between the followers of Bryant and the Conservatives as the salvation of the state.

The Radical majority was not quite strong enough to pass a resolution declaring that there should be no election in 1870, as was attempted in August of that year.* But it was strong enough to pass an election law very favorable to the Radical party. It changed the date of the election from the regular time in November to December 22, and following the example set by General Pope in 1867, provided that it should continue three days. It established a board of five election managers for each county, three to be appointed by the governor and senate, and two by the county ordinary. It provided that the board should have "no power to refuse the ballot of any male person of apparent full age, a resident of the county, who [had] not previously voted at the said election." Also it said: "They [the managers] shall not permit any person to challenge any vote."3 Another act was passed, calculated to prevent the loss of Republican votes through disqualification of negroes for non-payment of taxes. It declared the poll tax levied in 1868, 1869 and 1870 illegal.4

At the election thus provided for were to be chosen a new legislature (except half of the senators, who held four years) and Congressmen. To what extent the Republicans availed themselves of the advantages offered by the election law we do not know. At any rate, the Conservatives obtained two-thirds of the seats in the legislature, and five of the seven seats in Congress. 5

This result meant trouble for the governor, whose term ran to November, 1872. His efforts to secure Congressional interference, his conduct in January, 1870, and the accusa-

¹ M. F. U., Jan. 25, 1870.

³ H. J., p. 343.

³ S. L., 1870, p. 62.

⁴ *Ibid.*, p. 431.

⁵ Tribune Almanac, 1871, p. 75.

tions of extravagance, corruption, and other crimes continually made by an intemperate press, had raised public indignation to a high point. It was certain that when the new legislature met it would investigate the charges, and it was hoped that the governor would be impeached. The time of reckoning had been postponed, however, by the prudence of the outgoing legislature, which had provided that the next session of the legislature should begin, instead of in January, the regular time set by the constitution, on the first Wednesday in November, 1871.

The first Wednesday in November, 1871, was November 1. On October 23, the governor recorded in the executive minutes that he resigned his office, for "good and sufficient reasons," the resignation to take effect on October 30.4 He then quietly left the state. The fact that he had resigned was kept secret until October 30.5

In case of a vacancy in the office of governor, the constitution directed the president of the senate to fill the office.⁶ On October 30, therefore, Conley, the president of the senate at its last session, hastened to be sworn in as governor.⁷ By resigning just before the meeting of the incoming Conservative legislature, Bullock had thus cleverly prolonged Republican power, while at the same time resigning. The question whether under the constitution the governor's office should not be filled by the president of the newly-organized senate, was raised by the papers.⁸ But Conley was by common consent left in possession of the office. Though, as he said in his first message to the legislature,⁹ "a staunch Re-

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<sup>1</sup> M. F. U., March 14, 1871; Atlanta Constitution, Oct. 26 and 31, 1871.
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² Art. iii, sect. i, § 3.

⁸S. L., 1870, p. 419.

⁴ E. M., 1870-74, p. 197.

See entry of the secretary of state, ibid.

Art. iv, sect. i, § 4.

⁷E. M., 1870-74, p. 198.

^{*}Atlanta Constitution, Nov. 3, 1871. *S. J., 1871, p. 17.

publican," he was not personally unpopular. Moreover, the legislature intended to furnish a successor very soon.

On November 22, a bill was passed ordering a special election for governor for the remainder of the unexpired term, to be held on the third Tuesday in December.² The authority for this act was found in the following provision of the constitution: "The general assembly shall have power to provide by law for filling unexpired terms by a special election." Conley vetoed the bill, on the ground that the section of the constitution quoted empowered the legislature to make general provisions for filling unexpired terms, not to make special provision for single cases. The bill was passed over his veto.

Although Republican power was now doomed in a few weeks, and although resistance to a legislature which could easily override his vetoes was futile, yet Conley stubbornly continued to offer obstructions to the legislature at every possible point up to the very day when his successor was inaugurated. He exhibited a courage and a political efficiency worthy of his predecessor, but accomplished nothing. He was able, however, to help his friends by means of the pardoning power. Several prominent Republicans were indicted at this time for various acts of public malfeasance. On the ground that in the existing state of public excitement these men could not obtain a fair trial, Conley ordered proceedings against several of these to be discontinued.

On January 11, 1872, the returns from the special election

Atlanta Constitution, Nov. 2, 1871.

²S. L., 1871, p. 27.

⁸ Art. iv, sect. i, § 4.

⁴H. J., 1871, p. 179.

⁸ For vetoed bills see S. L., 1871 and 1872, pp. 12, 15, 18, 27, 68, 74. See also sbid., p. 260, and H. J., 1872, p. 25.

⁶E. M., 1870-74, p. 277 (pardon of V. A. Gaskill); Minutes of Fulton County Superior Court, vol. J, p. 404 (pardon of F. Blodgett).

were sent to the legislature by Conley, under protest,¹ and James M. Smith was declared elected. On January 12, Smith was inaugurated. Conley assisted at this ceremony, thus yielding the last inch of Republican ground.²

Reviewing the events recorded from the beginning of this chapter, we observe that the period of reconstruction in Georgia was not a period when a swarm of harpies took possession of the state government and preyed at will upon a helpless people. The constitutional convention of 1867-68 forebodes such a period, but when the Conservatives rouse themselves, from that time on the stage presents an internecine war between two very well matched enemies. This struggle is usually represented as between a wicked assailant and a righteous assailed. That it was a struggle between Republicans and Democrats is much more characteristic. In such a contest mutual vilifying of course abounded, and it is not to be supposed a priori that the vilifying of one party was more truthful than that of the other.

It is often vaguely said that reconstruction resulted in government by carpet-baggers. John B. Gordon, the Conservative candidate for governor who was defeated by Bullock, expressed before a Congressional committee in 1870 the belief that there were not more than a dozen men holding offices in Georgia who had recently been non-residents. He further said that the judges appointed by the Republican governor were entirely satisfactory.³

The reconstruction government is charged with having imposed such heavy taxes that as a result the people were impoverished, industry was checked, and many plantations went to waste. During the decade before the war the law provided that a tax should be annually levied at such a rate as to produce \$375,000, provided the rate should not exceed

¹ H. J., 1872, p. 25.

³ Ibid., p. 31.

⁸ K. K. R., vol. 6, p. 327.

one-twelfth of one per cent. The revenue law of 1866 provided that a tax should be levied at such a rate as to produce \$350,000. Owing to the vast destruction of property during the war, this necessitated a higher rate than that before the war. The law of 1867 ordered a levy at such a rate as to raise \$500,000. This law, made by the Johnson government, before reconstruction began, was continued by the legislature in the four following years. In 1870 the rate of assessment was two-fifths of one per cent. This rate was much higher than the one prevailing before the war, but this misfortune cannot be charged to reconstruction, since the reconstruction government merely followed the example of the Johnson government.

That the reconstruction régime did not do the economic harm often attributed to it is shown by the fact that during that régime the value of land and of all property in the state steadily increased, as appears from the following table:

	ASSESSED VA	LUATION.
Land.	Town and City Property.	Total Property.
1868 •	\$40,315,621	\$191,235,520
1869 [†] 84,577,166	44,368,096	204,481,706
1870 8 95,600,674	47,922,544	226,119,519
1871 • 96,857,512	52,159,734	234,492,468

Nevertheless, the reconstruction government spent the public money extravagantly. This fact is shown by a comparison of the expenditures of the state under Bullock's administration and under that of his predecessor. Such a comparison, it is true, has been employed to prove the contrary. Governor Bullock was wont to rebut charges of extravagance by showing that the state spent more under Jenkins' administration than under his, in proportion to the

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<sup>1</sup> Digest of tax laws, 1859, p. 11.

<sup>2</sup> S. L., 1865–66, p. 253.

<sup>3</sup> Ibid., 1866, p. 164.

<sup>4</sup> Ibid., 1868, p. 152; 1869, p. 159.

<sup>5</sup> B. L., p. 11.

<sup>6</sup> C. R., 1870 (printed in S. J., 1870, part ii, p. 83).

<sup>7</sup> C. R., 1870.

<sup>8</sup> C. R., April, 1871.

<sup>9</sup> C. R., April, 1872.
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time occupied by each. This was true, as the following figures show:

Gross expenditures in 1866 and 1867	\$3,223,323.46
Average annual expenditure during these years	1,601,661.73
Gross expenditures from August 11, 1868, to Jan. 1, 1870	2,260,252.15
Gross expenditures in 1870	1,444,816.73
Gross expenditures in 1871	1,476,978.86
Average annual expenditure during this period	1,554,614.32

A comparison of gross expenditures, however, is of no significance unless the sums contrasted represent payments for the same purposes. Under the earlier administration the government undertook large expeditures for the relief of destitute persons, especially of wounded soldiers and the relicts of soldiers.³ This accounts for the remarkable size of the amounts credited to "special appropriations" in the report for 1866 and 1867. Under Bullock's administration the government spent nothing for these purposes. For a fair comparison of the economy of the Johnson government and the reconstruction government, it is necessary to compare the amounts which they spent respectively for the same objects. Their payments for the more important administrative purposes are shown in the following table:⁴

	1866.	1867.	1868.	1869.	1870.	1871.
Civil Estab- lishment. Contingent		\$ 75,222.44	£50,373.72	\$ 85,666.41	\$77,851.77	\$78,365.21
Fund Printing	6,128.62	15,430.74	10,059.06	19,968.16	38,284.44	20,296.95
Fund Special	1,021.75	16,114.90	20,452.96	7,673.38	60,011.78	20,000.00
Appropri- ations	304,955.05	879 ,8 97.77	210,916.11	261,097.37	260,442.85	806,419.08

¹ B. L., p. 9; B. A., p. 42.

³ Report of state treasurer Jones, published in H. J., 1868, p. 361; R. C., 1870; R. C., April, 1871; R. C., April, 1872.

⁸ S. L., 1865-1866, pp. 12 and 14; ibid.,, 1866, pp. 10, 11, 143.

⁴Compiled from the financial documents above cited.

These figures show that almost all the annual expenditures of Bullock's administration, aside from "special appropriations," were well above those of the preceding administration, and that the payments from the printing fund, especially in 1870, and from the contingent fund in 1870, were so large as to convict the administration of great extravagance.

The reconstruction legislature was reproached because of its large per diem—nine dollars. This per diem was established by the Johnson government, and is, therefore, not a charge against reconstruction. But the other expenses of the legislature fully corroborate the charges of extravagance made against it. This is shown by the following table:

	Length of Session.	Total Expenditure.	Average Expenditure per month.
1865 and 1866.	Dec. 4 to Dec. 15. Jan. 15 to March 13. Nov. 1 to Dec. 14. 3% months.	\$121,759.75	\$33,207.18
1867.	No session.		
1868 and 1869.	July 4 to Oct. 6. Jan. 13 to March 18. 518 months.	\$446,055.00	\$84,161.33
1870.	Jan. 10 to Feb. 17. Apr. 18 to May 4. July 6 to Oct. 25. 516 months.	\$526,891.00	\$95,798.32

¹ S. L., 1865-66, p. 250.

The enemies of reconstruction were fond of placing the state expenses of Bullock's administration in juxtaposition with those before the war. Contrasts truly

² Compiled from the financial reports above cited.

The state debt created by the reconstruction government was of two kinds; direct and contingent. When the reconstruction government went into operation the state debt was \$6,544,500.¹ The reconstruction government incurred a bonded debt of \$4,880,000.² This includes bonds to the

horrible could thus be produced. But it was not a fair comparison, for the expenses in such circumstances as prevailed after the war and after the social revolution would naturally be larger than before. The expenses of many states besides those which enjoyed reconstruction increased largely after the war. E. & the records of Pennsylvania show that "Expenses of Government" were—

In	1857						 		٠.	•		• •				• •	 		 ٠.		\$423,448.89
	1858			• •	•	 • •	 •	• •	٠.			٠.		•	••	٠.		٠.	٠.	•	399,88 8.3 6
	1860					 	 		٠.				 				 		٠.		404,863.41
	1866		٠.				 				٠.		 			٠.	٠.		٠.		668,909.63
	1867					 											٠.		 		802,878.58
	1868																 ٠.		 		845,539.89
	1869		٠.			 	 		٠.			 	 				 		 		804,730.17
	1870		٠.									 ٠.							 		826,069.25

Pennsylvania Executive Documents, Auditor's Reports, for the years named. In Massachusetts the "Ordinary Expenses" were—

In 1857	\$1,236,204.26
1858	1,008,620.50
1859	999,899.76
1860 · · · · · · · · · · · · · · · · · · ·	1,193,896.41
1866	6,877,720.85
1867	5,953,003.31
1868	5,908,678.48

Massachusetts Public Documents for the years named.

In addition to the bonds already mentioned, bonds to the amount of \$600,000

¹ C. R., 1870.

²C. R., April, 1871, p. 14; C. R., April, 1872, p. 17; B. L., p. 13; Conley's message to the legislature, Jan. 11, 1872 (quoted in B. A., p. 6, and in K. K. R., vol. i, p. 141).

Of these bonds 3,000, representing a debt of \$3,000,000, were issued under a law of Sept. 15, 1870 (S. L., 1870, p. 10), authorizing the governor to issue bonds for various purposes without specified limit as to amount. The rest were issued under an act of Oct. 17, 1870 (omitted from the session laws, see Conley's message just cited), authorizing the governor to issue to the Brunswick and Albany railroad state bonds to the amount of \$1,880,000 in exchange for bonds of the railroad to the amount of \$2,350,000.

amount of \$1,880,000 which were issued to a railroad in exchange for its bonds to a greater amount and bearing interest at the same rate. This amount, therefore, was not a burden on the state, provided the railroad remained solvent; though in form a direct, it was virtually a contingent liability. Further, \$300,000 of the money borrowed was used to pay the principal of the old debt. Deducting these two sums, we find that the burden of direct debt was increased by \$2,700,000.

Contingent debt was incurred by the indorsement of rail-road bonds. In 1868 the state offered aid of this kind to three railroad companies, in 1869 to four, and in 1870 to thirty. The state offered to indorse the bonds of each of these companies to the amount, usually, of from \$12,000 to \$15,000 per mile, sometimes more and sometimes less. If all the roads had accepted the full amount of aid offered, the state would have become contingently liable for about \$30,-

were issued under acts of 1868 (S. L., 1868, pp. 14 and 138.) These were not sold and were returned to the possession of the state during Bullock's administration (Angier's statement, K. K. R., vol. 6, p. 162). Also, before the issue of \$2,000,000 mentioned, bonds to the amount of \$2,000,000 were issued (Conley's message cited). These were hypothecated with several bankers in New York. Some of them, amounting to \$500,000, were returned and cancelled during Bullock's administration (Conley's message). The rest, amounting to \$1,500,000, remained in the hands of the bankers. Conley stated, in January, 1872 (message cited), that these bonds had been replaced by bonds of a later issue and canceled during Bullock's administration, and had therefore ceased to be a claim against the state. This statement conflicts with three facts. 1. The bankers who held these bonds refused to return them after their alleged cancellation. 2. One of these bankers sold the bonds which he held after their alleged cancellation (Henry Clews, Twenty-eight Years in Wall Street, p. 277). 3. The legislature of Georgia repudiated these bonds in 1872, which would have been unnecessary if they had been cancelled. It seems probable, therefore, though not certain, that this \$1,500,000 should be added to the debt incurred by the reconstruction government.

¹S. L., 1868, title xvii.

¹ Ibid., 1869, title xv.

^{*} Ibid., 1870, title xi, division vii.

ooo,000. But only six roads accepted, and the contingent liability thus created was \$6,923,400. The laws offering the aid involved little risk to the state; they made substantial progress in construction and substantial evidence of soundness conditions precedent to indorsement, and secured to the state a lien on all the property of each road in case it defaulted. The indorsement of railroad bonds is not a reproach to the reconstruction government. The great policy of that government, when it was sufficiently free from partisan labors to have a policy, was to repair the prosperity of the state, and the construction of railroads was an important means to this end.

The worst stain on the reconstruction government is its management of the state railroad. The Western and Atlantic Railroad, owned and operated by the state until 1871, was placed under the superintendence of Foster Blodgett by the governor in January, 1870.4 Thenceforth hundreds of employees were discharged to make room for Republican favorites; important positions were filled by strangers to the business; the receipts were stolen,5 or squandered in purchases made from other Republicans at monstrous prices; and the road suffered great dilapidation.6

The preferred object of the Conservative abuse in the re-

Angier's statement, K. K. R., vol. i, p. 129.

² Conley's message above cited.

³ It is to be remarked, however, that four of the roads whose bonds the state had guaranteed became bankrupt before 1874. See Poor's Railroad Manual for 1873-4, pp. 432 and 582; and for 1874-5, p. 426.

⁴E. M., 1870-74, p. 449.

⁵ See the case of Hoyt, Minutes of Fulton County Superior Court, vol. I, pp. 371, 445.

⁶Report of the investigating committee of the legislature appointed in Dec., 1871. Its report was printed in Atlanta in 1872. It is bitterly partisan, but a minority report made by a Republican admits, with humorous resignation, that the charges are true.

construction government was Governor Bullock. We have seen that he was remarkably powerful as well as remarkably active in promoting the interests of his party. He was abused for that. For the extravagance of the state government the governor was held largely responsible. He was abused for that. But he was further accused of fraud in financial matters.

Although this charge has never been established, the public had some excuse for believing it at the time. As a result of the quarrel between the governor and the treasurer, the governor ordered the bankers who were the financial agents of the state to hold no further communication with the treasurer after June 3, 1869, but to communicate only with the governor.1 The effect upon the public was an impression of great confusion and irregularity in the finances The treasurer's reports could not give a complete account of state moneys, and the governor was not careful to inform the public of the condition of that part of the finances over which he had assumed control. Moreover, the governor and the treasurer kept up a constant interchange of accusation and insinuation in the newspapers. In another way the governor put himself in an unfortunate light. In his letter to the Ku Klux Committee his statements regarding his bond transactions were so vague as to give the impression (rightly or wrongly) of a desire to conceal something.2 The same laxity of statement appears in Conley's statement of the use to which the bonds issued by Bullock had been put.3 His sudden resignation and departure on the eve of a threatened investigation seemed to confirm the evidence of his guilt.

But though he did not keep the public informed, it has

¹ A. A. C., 1869, p. 305.

²See K. K. R., vol. i, pp. 137 and 138. The statements are on pp. 11 and 12 of the letter as published in Atlanta in 1871.

⁸ See Conley's message cited.

never been established that his accounts were wrong. He spent money freely, and in some cases without authority; but none of his accusers has ever proved that he spent any without regular and correct record by the comptroller. And though he issued bonds perhaps in excess, he issued none without proper registration in the comptroller's records. His apparent efforts to conceal facts do not prove fraud; a sufficient motive would be furnished by desire to conceal the extravagance of his administration. Furthermore, he has been positively acquitted of the charge of fraud. In 1878 he returned to Georgia, and the courts proceeded to give him "a speedy and public trial." Of his many alleged crimes, indictments were secured for three. One indictment was quashed,3 Upon the other two the verdict was "not guilty."4 His resignation was explained in a letter to his " political friends," published on October 31, 1871.5 He said that he had obtained evidence of a concerted design among

¹In the latter part of 1868 and in 1869 the governor paid to a certain H. I. Kimball \$54,500 from the treasury. He paid this to be used in furnishing a building which was at that time occupied as the state capital. (Bullock's statement, B. A., p. 29.) There was no law authorizing this payment, nor was the state under any obligation to make it. The state bought the building in 1870 by an act of the legislature which provided that the \$54,500 should be counted as part of the price. Thus Bullock's advance was ratified by the state. (S. L., 1870, p. 494.) This, however, does not change the character of the act.

² See C. R., April, 1871, and April, 1872. Bullock was accused of indorsing the bonds of three railroads contrary to law. In the case of two of these (the Cartersville and Van Wert, or Cherokee railroad, and the Bainbridge, Cuthbert and Columbus railroad) he refuted the charge beyond contradiction in his address to the public of 1872. In the case of the third (the Brunswick and Albany railroad) he admitted that he had indorsed bonds before the road had complied with the conditions required by law, but said that he did it for the public good. (B. A., pp. 39–41.)

³ Atlanta Constitution, Jan. 3, 1878; Minutes of the Fulton County Superior Court, vol. N, p. 261.

⁴ Ibid., pp. 263, 273.

⁵ Atlanta New Era, Oct. 31, 1871. Printed as an appendix to B. A.

certain prominent members of the incoming legislature to impeach him (as they could easily do, with the immense Conservative majority), and instal as governor the Conservative who would be elected president of the senate. To resign and put the governorship in the hands of a Republican who could not be impeached was the only way to defeat this "nefarious scheme." This explanation was of course ignored by Bullock's enemies when it was made; but in view of the lack of evidence that he was guilty of any fraud, and in view of the positive evidence to the contrary, there is now no reason to doubt it.

The governor made extraordinary use of the pardoning power. According to a statement sanctioned by him, he pardoned four hundred and ninety-eight criminals, forty-one of whom were convicted or accused of murder, fifty-two of burglary, five of arson, and eight of robbery. The leader of the Conservative party at that time, B. H. Hill, emphatically declared in a public statement that the governor had no worse motive than "kindness of heart."

To sum up the case against the reconstruction government, we have seen that it was extravagant, that it mismanaged the state railroad, and that it pardoned a great many criminals. It was not guilty of the enormities often associated with reconstruction; but it was a government composed of men who obtained polictical position only through the interference of an outside power—it was the product of a system conceived partly in vengeance, partly in folly, and partly in political strategy, and imposed by force. It was hated partly for what it did, but more for what it was.

¹ Appendix to B. L. (printed in K. K. R., vol. 7, p. 825).

² K. K. R., vol. 7, pp. 767 and 780.

CHAPTER X

CONCLUSION

A CONFEDERATE veteran recently remarked amid great applause at an assembly in Atlanta that there never was a conqueror so magnanimous as the North, for within six years from the surrender of the southern armies she had allowed the South to take part in her national councils. Nevertheless, within those six years the Congressional Disciplinarians gave the South a discipline which she will never forget. It did not result in permanent estrangement between the North and the South, for sectional bitterness seems extinct. But whether there was any profit in it—whether, in case the South never again attempts to secede, that happy omission will be due to reconstruction—may be doubted.

Was there a clearer gain from the humanitarian point of view? We have seen that at the close of the war a spirit of gratitude and philanthropy prevailed among the most influential of the southern white people as regards the negroes. Instead of allowing this spirit to develop and in the course of time to produce its natural results, the North, believing that suffrage was essential to the negro's welfare and progress, forced the South to enfranchise him, by reconstruction. This caused the negro untold immediate harm (since reconstruction was a contributary cause of Kukluxism), and delayed his ultimate advance by giving the friendly spirit of the white people a check in its development from which it has not yet recovered.

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From the point of view of the Republican Politicians, reconstruction at first succeeded, but later proved a mistaken policy. By it they lost the support of the southern white men who had been opposed to secession. These formed a large party in Georgia. The victory of the federal arms had the nature of a party victory for them. They would have added their strength to the Republican party. Reconstruction, with its threat of negro domination, drove them into the Democratic party, where they still remain. For a time this loss was made good by negro votes, but not long.

Without reconstruction there would have been no Fifteenth Amendment. But the good will and philanthropy of the people among whom the negro lives, which reconstruction took away, would have brought him more benefit than the Fifteenth Amendment. Without reconstruction there would have been no Fourteenth Amendment. But a long line of decisions of the Supreme Court has determined that the Fourteenth Amendment did not achieve the nationalization of civil rights—an end which might justify reconstruction as a means. In short, reconstruction seems to have produced bad government, political rancor, and social violence and disorder, without compensating good.

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